DETROIT:
THOMAS SMITH PRESS.
1901.

No. 152.

Office Supreme Court
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SUPREME COURT

Brief of Defendants Appellants

OF THE UNITED STATES

OCTOBER TERM, 1901.

No. 152.

Filed Sept. 9, 1901.

THE CITY OF DETROIT,
WILLIAM C. MAYBURY, *Mayor*,
CHARLES FLOWERS, *Corporation Counsel*,
Appellants,

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN—IN EQUITY.

BRIEF FOR APPELLANTS.

TIMOTHY E. TARSNEY,
Solicitor for Defendants and Appellants.

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Appeal from the Circuit Court of the United States for the Eastern District of Michigan—In Equity.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

The appellee, as complainant, filed its bill in the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, in Equity, to restrain appellants, defendants therein, from the enforcement of certain ordinances adopted by

the Common Council of the City of Detroit, regulating the rates of fare to be charged upon certain street railways within the limits of said city.

The appellee is organized as a corporation under the provisions of Chap. 95 of Howell's Annotated Statutes of Michigan. In September, 1891, it acquired title by purchase from certain street railway companies then owning the same, certain lines of street railway constructed and in operation in the City of Detroit, and especially the lines of street railway theretofore constructed, owned and operated by the Detroit City Railway, and certain other lines of street railway owned and therefore owned and operated by the Grand River Street Railway Company. (R., p. 2.) The Detroit City Railway and the Grand River Street Railway companies were organized under the provisions of Chap. 94 of Howell's Annotated Statutes. (R., p. 3), and the rights of complainant and appellee are derived through certain ordinances granting to said street railway companies the right to construct and operate street railways in and through the streets of the City of Detroit. The bill also alleges the acquisition by complainant of some other smaller lines of street railway (R., pp. 8-9.), but the principal part of the system owned by complainant was organized under the provisions of Chap. 94 of Howell's Statutes, commonly known as the "Train or Tram-railway" act, being Sec. 3493, etc., of Howell's Annotated Statutes.

November 24, 1862, the Common Council of the City of Detroit adopted an ordinance to permit certain persons to establish certain railroads in the City of Detroit. This ordinance is printed in full in the Record, pp. 27-35, and is the same as referred to in the third paragraph of complainant's bill (R., pp. 2-3), under which the Detroit City Railway Company operated. The Grand River Street Railway ordinance is found on pp. 52-57 of the Record. In Section 8 of the ordinance of November 24, it is provided, that the rate of fare for any dis-

fance shall not exceed five cents on any one car, or on any one route named in this ordinance, except where cars or carriages shall be chartered for special purposes, provided that the cars so chartered shall not be considered regular cars within the meaning of the section. (R., p. . .)

Identically the same language is used in Section 6 of the Grand River Street Railway ordinance (R., p. 54), and Sec. 8 of the Fort Wayne and Elmwood ordinance, p. 158.

Section 19 of the Detroit City Railway ordinance is as follows:

"Section 19. It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interests, safety, welfare and accommodation of the public in relation to said railways."

Section 18 of the Grand River Street Railway ordinance is in identically the same language (R., p. 56). Many supplemental and extension ordinances were afterwards adopted by the Common Council, and all or nearly all contain the same provisions relative to the rates of fare, and reservation of the right to make further rules and regulations.

On the 11th of August, 1899, the Common Council of the City of Detroit, adopted a certain ordinance reducing the rates of fare on the said several lines of railroad, being Exhibits "A," "D 2," "C," "D," "E," and "B" (R., pp. 17-21), whereupon the complainant filed its bill to restrain the enforcement thereof. A restraining order and order to show cause why an injunction should not issue was made by Judge Swan (R., p. 23). Defendants answered, p. 106, and submitted the several ordinances under which said complainant was operating its lines, and it was subsequently stipulated that the case might be heard on evidence and proofs taken in open court (R., p. 173), and a stipulation of facts was made therein (R., pp. 772-773), upon which said cause was heard, and thereafter the court entered a decree that

said several ordinances adopted by the Common Council in August, 1899, impaired the obligations of the grants, contracts, rights and privileges of complainant under previously adopted ordinances, and granted a perpetual injunction (R., p. 174); from this decree defendants appeal.

The several street railroad companies to whose rights and privileges the complainant claims to succeed, namely: The Detroit City Street Railway Company, the Grand River Street Railway Company, the Fort Wayne and Elmwood Railway Companies were all organized under the provisions of Chapter 94, Howell's Statutes, Sections 3495, etc.

This act was originlly passed in 1855 and did not contemplate the construction of street railways.

February 2, 1861, the Legislature amended the act by adding thereto Sections 33 and 34, as follows:

It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this State. All companies formed for such purposes shall have the exclusive right to use the same, provided, however, that no such company shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of said town or city, and under such regulations, and upon such terms and conditions as the said authorities may, *from time to time, prescribe.*

Laws of 1861, pp. 11 and 12.

This continued to be the sole provisions upon the subject of street railways in this act until March 27, 1867. Laws of 1867, p. 257, at which time Section 34 was amended by adding thereto the following:

Provided further, that after such consent shall have been given and accepted by the company or corporations to which

the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be *destroyed or unreasonably impaired*, or such company or corporation be deprived of the right of constructing, maintaining and operating such railroad in the street in such consent or grant named, pursuant to the terms thereof. (H. S., Sec. 3527.)

This act was approved March 27, 1867, and has remained unchanged until the present day.

March 5, 1867, an act to provide for the formation of street railway companies was approved, being Chapter 95, H. S., Section 3536, etc.

It will be noticed that the ordinance of November 24, 1862, namely: the Detroit City Railway ordinance, was adopted long prior to the amendment of the Train Railway Act of 1867, and the general law providing for the incorporation of street railway companies. The grantors of the complainant being incorporated under the provisions of Chapter 94, we must look to it as the source from which all the power and authority of the railway company is derived, unless the provisions of the street railway act, H. S., 3564, are to be construed in connection with the act, and which complainants' grantors were incorporated, a question we shall discuss at the proper time.

It will be noticed that several new sections were added to the Tram Railway Act after the enactments of the general street railway law, providing for the corporation of street railways in cities and villages, and particular attention is called to Section 42, being Section 3535, Howell's Statutes, which reads:

"*All the provisions of this act, as amended, shall be applicable to all corporations now organized under this act as though specifically named.*"

The Tram Railway law is the last legislative declaration upon the subject, and under well recognized rules of statutory construction, being the last, it controls all former provisions in the

same or any other law, and specific methods of regulation having been provided for in the act of 1861, namely: "Such regulations * * * as said authorities may, *from time to time*, prescribe," must control the relation between the city and the street railway company.

This provision will be more fully discussed hereafter.

I.

THE COMMON COUNCIL OF DETROIT POSSESSED NO AUTHORITY TO PASS THE VARIOUS ORDINANCES UNDER WHICH THE COMPLAINANT IS OPERATING ITS ROAD, EXCEPT SUCH AS WAS CONFERRED UPON IT BY EXPRESS GRANT OF THE LEGISLATURE OF THE STATE OF MICHIGAN.

And such grant did not authorize the Common Council to make an irrevocable contract in relation to the rates of fare.

In People's Railroad Co. vs. Memphis R. R. Co., 10 Wall., 38 (844), the mayor and aldermen of the City of Memphis invited bids for the construction of a railroad in certain streets of the city; and they awarded the contract to two persons whose bid was made in their own behalf and as agents of certain associates, afterwards constituted the People's Passenger Railroad Company of Memphis; with the understanding that the conditions of the contract as made and accepted should not be changed. The railroad company thereby claimed that they were invested with a franchise that neither the Legislature nor the City Council, nor any other party, could constitutionally invade. Afterwards the Legislature of the State of Tennessee incorporated the Memphis City Railroad Company, and expressly authorized it to construct, maintain, use and operate street railways by animal power in all or any of the streets of the City of Memphis, to use for that purpose the necessary machinery and equipments, and to make, complete and execute all con-

tracts and agreements made with the city or other parties, for any purpose connected directly or indirectly with the construction, maintaining or operating of such railway, and to alter or enlarge the terms of the same with the said parties. Under this authority the Memphis City Railroad Company proceeded to construct a railroad, when they were stopped by the city authorities. The company thereupon filed a bill against the city, and the People's Railroad Company intervened, claiming that it had acquired rights under the previous arrangement with the mayor and aldermen which amounted to a contract that could not be impaired. Mr. Justice Clifford in the opinion, in speaking of the claims of the People's Company, said: "They insist that the exclusive right to construct railroads for the transportation of passengers over the streets of that city, and to use the streets for that purpose, was granted by the city authorities, to certain individuals as directors, before the respondents were incorporated, and that they (the respondents) with the consent of the city subsequently became the assignee of that contract and agreement, and as such were and are invested with authority to complete and execute that contract and agreement as ratified and confirmed by the Legislature. None of the elements of that proposition are admitted by the complainant, but they insist that municipal corporations have no power to grant such a franchise to individuals or other corporations, unless thereunto *especially authorized* by the Legislature. And they also insist that no such power is shown to have been conferred in this case.

"Power to make laws is vested in the Legislature, under the Constitution of the State, and it is very doubtful whether the legislative department can delegate to any other body or authority the power to grant such a franchise, as the exercise of that power involves a high trust created and conferred for the benefit of those who granted it, and as the trust is confided to the Legislature, it must remain where it is vested until the Constitution

of the State is changed." Cooley, Const. Lim., 117; Thorne vs. Cramer, 15 Barb., 112; Barto vs. Himrod, 8 N. Y., 483; Parker vs. Com., 6 Pa., 507; Sedgw. Con., 165; Wayman vs. Southard, 10 Wheat., 46.

Franchises, it is conceded, cannot as a general rule, be granted by such a corporation, and it is clear that the privilege of making a railway or turnpike, or establishing a ferry and making tolls for the use of the same, is a franchise as the public have an interest in the same, and the owners of the privilege are liable to answer in damages if they refuse the use of the same, without any reasonable excuse, upon being paid or tendered the usual fare. 3 Kent, Com. (11th ed.), 590; Willoughby vs. Horridge, 16 Eng. L. & E., 437; Beekman vs. S. & T. R. R. Co., 3 Paige, 45.

IV. Consonant with that view this court held, in the case of Bk. of Augusta vs. Earle, 13 Pet., 595, that franchises are special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right; and that in this country no franchise can be held which is not derived from the law of the State. Ang. & Ames, Corp. (8th. ed.), 2; State vs. Armstrong, 3 Sneed, 634; Mayor vs. Shelton, 1 Head, 24.

Contracts, undoubtedly, may be made by such municipalities, to the extent of the authority conferred for that purpose by the Legislature, but the granting of a franchise is not the same thing as a contract, and the exercise of such a power cannot be upheld or vindicated as falling within the same rule as the power to make contracts.

By the amendment to their charter, passed February 13th, 1854, the authorities of the city were empowered to regulate the laying of railroad iron and the passage of railroad cars through the city; but the better opinion is that the provision in that behalf relates to the construction of railroad tracks and the running of railroad cars through the city by incorporated com-

panies whose cars are propelled by steam, and that it has no reference whatever to the construction or authorization of a street passenger railway within the corporate limits, as claimed by the respondents in their answer. Sess. Laws, 1854, p. 294; Moses vs. Railroad Co., 21 Ill., 522.

Authority is also conferred on municipal corporations by the Code of that State, "to grant privileges in the use and enjoyment of the streets" of the municipality; but it would be a very forced construction to hold that the grant of such a franchise for twenty-five years is included in the provision. Code (1858), p. 303.

V. Independently of those provisions, it is quite clear that the municipal authorities of the city possessed no such power as is supposed by the respondents. Such corporations are usually invested with the power to lay out, open, alter, repair and amend streets within the corporate limits; but the rule is well settled that by virtue of those powers, without more, they cannot grant to an association of persons the right to construct and maintain for a term of years a railway in one of the streets of the municipality for the transportation of passengers for private gain, and that an ordinance or resolution of the authorities granting such a right is void. Davis vs. Mayor, N. Y., 14 N. Y., 514.

Special powers are given to such corporations to lay out, open and repair streets, as a trust to be held and exercised for the benefit of the public, from time to time, as occasion may require, and the general rule is, that those powers cannot be delegated to others, nor be effectually abridged by any act of the municipal corporation without express authority from the Legislature. Milhau vs. Sharp, 27 N. Y., 611; People vs. Kerr, 27 N. Y., 188; Elliott vs. F. & W. R. R., 32 Conn., 579; Wager vs. R. R., 25 N. Y., 526; People vs. R. R., 45 Barb., 63; Street Railway vs. Cummingsville, 14 Oh. St., 523; State vs. Hoboken, 1 Vroom, 225.

Municipal corporations are, doubtless, invested with subordinate legislative powers, to be exercised in the passage of ordinances for local purposes connected with the public good, but they are merely derivative, and are subject at all times to legislative control. 2 Kent. Com., 11th ed., 317; Rogers vs. Burlington, 3 Wall., 663 (70 U. S., XVIII., 82.)"

In Wright vs. Nagle, 101 U. S., 791 (921), the facts were: In July, 1851, the Inferior Court of Floyd County, Georgia, entered into a contract with one Miller, by which for a good and valuable consideration it granted to Miller and his heirs and assigns, so far as it had authority for that purpose, the exclusive right of opening ferries and building bridges across certain rivers, at Rome, within certain specific limits. Miller, on his part, bound himself by certain covenants and agreements appropriate to such contract. Miller afterwards assigned his rights, so that when this suit was commenced Wright and Shorter were the owners. Large amounts of money were expended in building and maintaining the required bridges, and the franchise is a valuable one. In 1872 the Commissioner of Roads and Revenue for the county authorized the defendant to erect and maintain a toll bridge across one of the rivers within the limits of the original grant to Miller. Wright and his associate brought suit in equity to restrain defendant from constructing such a ferry.

By an act of the Legislature of Georgia the inferior courts in the several counties were empowered if they shall deem it necessary to authorize the establishment of such ferries or bridges as they may deem necessary, other than car ferries and bridges authorized or established by law, and to allow such rates for crossing thereat as are usual and customary on water courses of the same width. By another act they were given power and authority to hear and determine all matters which may come before them relative to roads, bridges, etc., as are authorized by law; and to have power to establish ferries and rates of toll

to be taken. Mr. Chief Justice Waite said: "It has been decided in Georgia that the right to receive toll for the transportation of travellers and others across a river on a public highway, is a franchise which belongs to the people collectively. Young vs. Harrison, 6 Ga., 130. A grant of this franchise from the public in some manner is therefore necessary, to enable an individual to establish and maintain a toll-bridge for public travel. The Legislature of the State alone has the authority to make such a grant. It may exercise this authority by direct legislation or other agencies duly established, having power for that purpose. The grant, when made, binds the public and is directly or indirectly the act of the State. The easement is the legislative grant, whether made directly by the Legislature itself, or by any one of its properly constituted instrumentalities. The complainants' claim that they have such a grant through the agency of the Inferior Court acting under the authority of the Legislature. This is denied, because, as is insisted, the Legislature has not given the court the power to make an *exclusive* grant. * * * We therefore proceed to consider whether the Inferior Court had the power to grant to Miller the exclusive right. It certainly has done so if the power existed. * * * The only question is, whether power for that purpose had been delegated to the Inferior Court." After quoting the statute, the learned judge continued: "Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will not be presumed. Every statute which takes away from the Legislature its power will always be construed most strongly in favor of the State. These are elementary principles. The question here is, whether the Legislature of Georgia conferred on the Inferior Courts the power of contracting away the rights of the State to establish such ferries and bridges in a particular locality as the ever-changing wants of the public should in the progress of time require. In our opinion it did not. It gave

these courts the right to establish ferries or bridges, but not to tie the hands of the public in respect to its future necessities. The right to establish one bridge and fix its rates of toll does not imply the power to bind the State or its instrumentalities not to establish another in case of necessity."

In Saginaw Gas Light Co. vs. The City of Saginaw, 28 Fed. Rep., 529, Judge Brown in an elaborate opinion approved the doctrine as stated by Judge Dillon, that a municipal corporation possesses and can exercise the following powers, and no other:

(1) Those granted in express words;

(2) Those necessarily or fairly implied or incident to the powers expressly granted;

(3) Those essential to the declared object and purpose of the corporation, not simply convenient, but indispensible.

Any fair or reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act or make any contract, or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void. In this case the Common Council of Saginaw passed an ordinance granting to certain individuals the exclusive right of erecting, maintaining and continuing gas works within the city. In 1886 the Common Council passed another resolution accepting a proposition which had previously been made by the Jenney Electric Light Co., and entered into a contract with the company to light the public streets. Thereupon the gas company filed its bill in this court. Judge Brown said: "That the State, in its sovereign capacity, may grant a monopoly of this description, and that such monopolies will be protected against a subsequent conflicting grant, has lately been settled by the Supreme Court in New Orleans Gas Co. vs. Louisiana Light Co., 115 U.

S., 650; S. C., 6 Sup. Ct. Rep., 252; and Louisville Gas Co. vs. Citizens Gas Co., 115 U. S., 683, S. C., 6. Sup. Ct. Rep., 265. But whether under a charter simply authorizing a municipal corporation "to cause its streets to be lighted," it may grant an exclusive privilege of this description, for a term of years, is a widely different question. Bearing in mind that the powers of the municipality are strictly limited by its charter, it is needful to inquire whether the grant of an exclusive franchise is a proper and reasonable method of exercising its authority to light the public streets, and furnish gas to its inhabitants. We think it entirely clear that the city is not bound to manufacture and furnish the gas itself, but may contract with any individual or company for lighting the city, and, as an incident thereto, may authorize the use of its streets for laying pipes and mains. Indeed, this is not only a usual and convenient mode of exercising its power, but, in the general law for the organization of gas companies, it is expressly provided that such corporation shall have power to lay conductors, etc., with the consent of the municipal authorities of such city, town, or village, under such reasonable regulations as they may prescribe. That is here an implied, if not an express, authority for the city to contract with any corporation which may be organized under the act.

It is clear, however, that there is no authority expressly given to confer upon any corporation the exclusive right to occupy its streets for a number of years. It is true, it may, in effect, grant such exclusive right by refusing to any other company the franchise or privilege it has already granted to one; but this presupposes a continued and abiding consent on the part of the city to keep alive its contract, and is quite distinct from the right of the city to surrender its power to make another contract, and to vest in the plaintiff the right to determine for itself whether a rival company shall be permitted to enter its domain. While there is great force in plaintiff's argument, that individuals would not be likely to incur the great expense of establishing

gas works and laying pipes without some assurance of a profitable and continued employment for a sufficient length of time to remunerate them for their outlay, we think the law is too well settled that this cannot be done, without express permission of the sovereign power, to be now disturbed. If a grant of this kind for thirty years may be supported, why may it not, by parity of reasoning, be upheld for a hundred years, or in perpetuity?

The common law of England declares that monopolies cannot emanate from the Crown, and can only be conferred by Act of Parliament (Bac. Abr. tit. "Monopoly"), and a by-law which creates a monopoly is void (Jac. Law Dict.).

The great weight of authority in this country is in this direction. Thus, in Norwich Gas Co. vs. Norwich City Gas Co., 25 Conn., 19, a municipal ordinance, purporting to grant the exclusive privilege, of laying gas pipes through the streets of a city for a period of fifteen years, was held to give the grantee no interest in the soil, and no title which would enable him to restrain another company from doing the same thing, provided it did not interfere with his works. The court went even further—beyond what we believe now to be the accepted doctrine—and held that the business of manufacturing and selling gas was an ordinary business, in respect to which the government had no exclusive prerogative, and that the legislature itself had no power to amend the plaintiff's charter, so as to give it the exclusive privilege claimed.

We are not, however, without the authority for our proposition, that nothing will be intended from a legislative grant to a municipal corporation.

In Minturn vs. Larue, 23 How., 436, it was held, that a charter authorizing the City of Oakland to establish and regulate ferries, or to authorize the construction of the same, gave no power to the city to grant an exclusive privilege. In delivering the opinion Mr. Justice Nelson observed:

"It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

In the case of Wright vs. Nagle, 101 U. S., 791, to which reference has already been made, it was held that legislative power given to an inferior body to establish ferries and bridges did not authorize such body to grant the exclusive right to one person, though there was no doubt that the legislature itself had authority to make such a grant. The case is upon all fours with the one under consideration.

The same question was argued with great skill and thoroughness in State vs. Cincinnati Gas Light & Coke Co., 18 Oh. St., 262. In this case the charter conferred on the gas company power "to manufacture and sell gas, to lay pipes," etc., provided the consent of the City Council be obtained for that purpose. Under a power given to the City Council of Cincinnati, "to cause said city, or any part thereof, to be lighted with oil or gas," and to levy a tax for that purpose, it contracted to invest the defendant with the full and exclusive privilege of using the streets, etc., for the purpose of lighting the city for the period of twenty-five years, and thereafter, until the city should purchase the works. It was held that, while there was no doubt that the city might by contract provide for the lighting by gas, there was no necessity for making such right exclusive, and that the city had no authority to make the grant.

So, in Richmond Co. Gas Light Co. vs. Middleton, 59 N. Y., 228 the board of the town corporation was authorized to cause the streets to be lighted with gas whenever they deemed it necessary, and required the board to contract with the plaintiff com-

pany to supply the same with gas. This was held by the Court of Appeals not to confer the power on the board to make a contract which should be binding on the town for a *fixed term of years*, and that the contract was terminated by the repeal of the act under which it was made.

Other analogous cases are to the same effect:

Dogan vs. Pyne, 43 Iowa, 524, in which an exclusive grant to one person to run omnibuses was held not to be the valid exercise of a power to "license, tax, and regulate omnibuses."

Jackson County Horse R. Co. vs. Rapid Transit Co., 24 Fed. Rep., 306. In this case it was held by Judge Brewer, that, in the absence of express authority in its charter, the City of Kansas had no power to grant to a street railway company the sole right, for the space of twenty-one years, to construct, maintain, and operate their railway over and along the streets of said city."

[In City of Detroit vs. The Railway Company, 95 Mich., 456, a case where the Fort Wayne & Belle Isle Railway Company was compelled by an ordinance of the City of Detroit to sell to persons applying therefor upon all of its cars tickets to be good for transportation over its entire system, the Court said: "Ordinances containing grants are construed liberally in favor of the public."]

In People vs. Detroit Citizens' Street Railway Co., 116 Mich., 132, the Common Council of the City of Detroit adopted an ordinance requiring the Street Railway Co. to "provide sufficient cars upon Gratiot avenue, so that a six-minute service shall be given upon said avenue between Mack and Sheridan avenues between the hours of 5:30 a. m. and 10 p. m." Mr. Hutchins, the vice-president of the company, was prosecuted for the violation of this ordinance, and set up in his defense that said ordinance impaired the contractual relations existing between the city and the company under the

provisions of Section 7 of the ordinance of November 24, 1862, which reads:

Sec. 7. "The cars to be used on said railways shall be drawn by animals only, at a speed not exceeding the rate of six miles per hour, and shall be run as often as public convenience shall require, and the Common Council shall prescribe. Provided always that said council shall not require them to run regular cars oftener than once in twenty minutes during fourteen hours every day, from the fifteenth day of April to the fifteenth day of October, and twelve hours every day from the fifteenth day of October to the fifteenth day of April."

The Court said:

"It is said that the ordinances of 1862 and 1873 constitute a contract between the city and the Street Railway Company, and that 'the ordinance of 1879 was not a new grant or a new consent. It was confessedly an extension of the old grant of consent, upon the terms and conditions of the old consent, except in so far as those terms were readjusted'—citing Detroit Citizens' Street Railway Co. vs. City of Detroit, 13 C. C. A., 365 (26 L. R. A., 667). It is now urged that as the city agreed by the provisions of Section 7 of the ordinance of 1862, not to require the company "to run regular cars oftener than twenty minutes during fourteen hours every day from the fifteenth day of April to the fifteenth day of October, and twelve hours every day from the fifteenth day of October to the fifteenth day of April," by reason of its contract with the company the city cannot now require the company to run cars oftener than once in twenty minutes. All of these provisions in the various ordinances, so far as they appear in the record, relating to the frequency with which cars shall be run, the rate of speed, and the motive power allowed, have already been quoted.

In construing these ordinances it may be worth while to inquire into the situation when they were passed. Detroit, in 1862, was a city of about 50,000 people. Its residents all lived within a comparatively short distance of the business center. A street railway was comparatively unknown. It was yet in an experimental stage. No more practical method of furnishing motive power was known than the use of animals. It was believed that a speed not exceeding 6 miles and hour, and cars run not more frequently than three times an hour for fourteen hours in the day part of the year, and twelve hours a day for the remainder of the year, would answer the convenience and demands of those who were likely to be patrons of the road. The franchise conferred by the ordinance of 1852 would end by its terms in 1892. In 1879, the population of the city was upwards of 100,000 people, and the city was growing rapidly. Street railway systems were no longer experiments. A franchise like that conferred by the ordinance of 1879, in a city like Detroit, was known to be an exceedingly valuable thing. The ordinance of 1879, by its terms, gave the company a franchise for thirty years. Improved methods of motive power were coming into vogue. Portions of the residence part of the city were much farther from the business center than in 1862. The public demanded quicker and more frequent service then than it had earlier. Is it likely that, under such circumstances, the council would confer a franchise for thirty years over the principal streets of a great and growing city, with a limitation that the city shall not require the running of cars oftener than three times an hour, and not at all for ten hours of the day for part of the year, and twelve hours a day for the remaining portion of the year? On the other hand, is it probable that the railway company would be willing to accept an ordinance running for thirty years which limited it to animal power in the trans-

portation of its cars, and to a speed of six miles an hour? We think this contention is unreasonable, and that the ordinance of 1879 was given and accepted with the understanding of all parties to it that the provison in section 4, "that the cars on all lines subject to this ordinance shall be operated as the public convenience may require and the common council order should control."

It strikes me that the question involved in this controversy is settled in favor of appellants by the decision of this court in Freeport Water Co. vs. City of Freeport, 21, Sup. Ct. Rep., 493. The court will pardon me, if for personal convenience I refer thereto and to the statutes and ordinances therein considered:

"An Act to enable cities and villages to contract for a supply of water for public use, and to levy and collect the tax to pay for water so supplied. Approved April 9, 1872.

"Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities and villages where water-works may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for the supply of water for public use, for a period not exceeding thirty years."

The authorities of the City of Freeport adopted an ordinance granting to Nathan Shelton or his assigns, the exclusive right and privilege for the term of thirty years from the 1st of July, 1882, of supplying the City of Freeport and the citizens thereof with water. Sec. 2, after reciting for the use of streets, etc., recites that: "All the rights and liabilities provided for in this ordinance shall continue for a period of thirty years unless sooner extinguished by *purchase*, as hereinafter provided."

Sec. 7 provided for the payment of a fixed sum as the annual rental for hydrants, and declared that said rentals shall be payable semi-annually, * * * "and shall continue for the full term specified in this ordinance, unless said city shall sooner become the owner of said water-works, as hereinbefore provided, in which event said rental shall cease."

Sec. 13, declared that the ordinance shall become binding as a contract upon the written acceptance thereof by the grantee. * * * "and this ordinance when so accepted shall not be altered, amended or changed in any way, without the concurrence or consent of both parties thereto and interested therein, or their successors or assigns."

This Court, in its majority opinion, said:

"The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public, the court applied the rule declared in many cases. We said in the Railroad Commission cases, 116, U. S., 307, by Chief Justice Waite, of the power of the regulation of rates:

" 'This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank vs. Billings, 4 Pet., 514, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been applied and considered are numerous."

These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipalities of the state shall be continuing or occasional, indeed only special in its purpose, intended to have but one

exercise, and then bound in contract for thirty years. *If the latter had been the intention it would have been natural to express it.*" * * * There is no explicit provisions for repetitions of the power,—none declaring the power conferred a continuing one. Who now doubts that it is? * * * Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain water-works, "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." The words, "fixed by ordinance," may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is the most favorable to the public, not that one which would so tie the hands of the council, that the rates could not be adjusted as justice to both parties might require at a particular time."

Indeed, Mr. Justice White, in his dissenting opinion, agrees to the rule we contend for. He said:

"It is unquestioned also that where a right asserted, if enforced will put a contractual limitation upon the power of the law-making authority of the State, presumably to be exercised for the public benefit, the doubt is to be resolved in favor of the continued existence of the law-making power. In other words, that no contract limitation on the powers of government can be upheld by mere implication, or sustained if there be doubt on the subject. The existence of such a contract relation must arise clearly and by express intendment."

Again, in Rogers Park Water Co. vs. Fergus, 21. Sup. Ct. Rep., 490, Mr. Justice White said:

"Of course it is conceded under the rule of construction set by me in my dissent in the Freeport case, that if doubt arose from an analysis of the provisions of a contract, that doubt must be solved against the Water Co. in favor of the municipality."

Whatever ambiguity may have existed in the statutes of the State of Illinois, surely no ambiguity exists in the language of the Tram-railway Act of the State of Michigan, as it is expressly provided therein that no such company or corporation shall be authorized to construct a railway under this Act, through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities *may from time to time prescribe.*" This surely is a continuing power of regulation, and nothing is contained therein from which a grant of authority to the municipality to make an irrevocable contract can be implied. A contract for a fixed and definite period would be in violation of the letter and spirit of the statute, which contemplates the power of continuing regulation. And the Street Railway Act, being Chap. 95 of Howell's Annotated Statutes, will not bear any other or different construction. Not a word can be found in it from which the implication may arise that it was the legislative intent to confer upon the common council of the city the power to make a time contract; indeed, the implication is the other way. By Sec. 20, the rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and *shall not be increased* without the consent of such authority. Why prohibit the increase of the rate of fare, and not prohibit the

decrease? Unless the power to decrease or to make regulations from time to time was recognized as existing.

A reference to the laws under which the Street Railway Companies are organized and operate, and the Ordinances of the City of Detroit with them, clearly demonstrate that no contractual relation of a fixed or permanent character exists between the City of Detroit and the Detroit Citizens Street Railway Company The original companies of which the present Detroit Citizens' Street Railway is a successor, were organized under the provisions of the Train or Tram Railway Act, Howell's Statutes, 3495-3535. [By Section 3527, as amended by the Laws of 1867, page 257, it is provided that "All companies or corporations formed for such purpose shall have exclusive right to use and operate any street railways constructed under or held by them; provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be *destroyed or unreasonably impaired*, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the streets, in such consent or grant named pursuant to the terms thereof."] It will be noticed that the limitation placed upon the power of the authorities is to make *no regulation or conditions* whereby the rights or franchises so granted shall be *destroyed or unreasonably impaired*. Bearing in mind the general rule, that the use of this railroad is a Public Use, and the further rule, that the

compensation for such use must be *reasonable*, it cannot be said that the regulations of fares at a sum that is *reasonable* is either a *destruction or unreasonable impairment of the rights and franchises* of such company. So the right to make changes and new regulations is reserved in the act itself,—the only limitation being, that such new regulation must be *reasonable* and *not destructive* of the rights granted. [So that the provisions of Section 19 of the Ordinances, by which it is reserved to the Common Council the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railway, is only declaratory of the rights and powers reserved in the Common Council by the act of incorporation itself. This view was taken by the Supreme Court of this State in City of Detroit vs. Railway Company, 95 Mich., 456, where both the statute and the reservation in the ordinances is quoted by the learned Judge who delivered the opinion.

City of Lansing vs. Lansing City Electric Railway Company, 109 Mich., 123, was mandamus by the City of Lansing to compel the railroad company to pave with brick between its tracks. Section 12 of the Lansing Ordinances contains the same reservations of power in the Common Council as Section 19 in the Ordinances under consideration here. The court said it was the plain duty of the railway company when ordered by the Council, to repave with bricks to comply with the resolution.

It will be borne in mind that the Detroit City Railway Company, the Fort Wayne & Elmwood Co. and the Grand River Street Railway were all incorporated under the provisions of the Train Railway Act of 1855; and are subject to its provisions. In 1867, the legislature passed the Street Railway Act, Sections 3536, etc., H. S. By Section 13 of the

Act of 1867, being Section 3548 of Howell's Statutes, it is provided that "Any company organized under the provisions of this act may * * * construct, maintain, use and own a street railway for the transportation of passengers in and upon the lines on such streets and ways as shall be designated and granted from time to time in the ordinance or ordinances granting such consent. Section 14, "After any city, village or township shall have consented, as in this act provided to the construction and maintenance of street railways therein, or granted any rights and privileges to such company, and such consent and grant having been accepted by the company, such township, city or village shall not revoke such consent nor deprive the company of the rights and privileges so granted." Section 20, "The rates of toll or fare which any street railway may charge for the transportation of persons or passengers over their road shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and *shall not be increased*, without the consent of such authorities. Mark the difference between the two acts. By section 34 of the Train Railway Act, being the amendment of 1867 supra, it is provided that the railway company may operate under such regulations and upon such terms and conditions as the authorities *may from time to time prescribe*." And further, that after the acceptance by the company the authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be *destroyed or unreasonably impaired*. In the Street Railway Act the language is, "That after the company shall accept it, such township, city or village shall not *revoke* such consent, nor deprive the company of the rights and privileges so conferred. In view of the fact that the rates of toll to be charged are specifically referred to in Section 20, under the well recognized rules of statutory

construction, that "*particular or specific words or provisions will control the general words or provisions of the same act* (23 A. & E. Enc. L. 427-8), the rates of toll were not intended to be included in the terms rights and privileges used in Section 14, but the legislative intent apears to have been to deal with the *rates of toll* separate and distinct from the *other* rights and privileges conferred upon said companies by the provisions of the sections. And it will be noted in Section 20, that "such rates of toll shall not be *increased* without the consent of such authorites." This implies that the legislature, by Section 20 of the Act of 1857, while prohibiting the railway from increasing the rates of toll, fully understood that the authorities might decrease such rates, inacmuch as no inhibition is placed upon the authorities in that regard. This view will become more apparent when we come to consider at a subsequent stage of this discussion the power of the legislature or of the Common Council to bind itself by the fixed and definite agreement for a term of years relative to the rates of fare to be charged.

The provisions of the Street Railway Act, however, become quite immaterial in construing the powers of the present company that it obtained through the purchase of the property or franchise of the Detroit City Railway Company, the Grand River line and the Fort Wayne & Elmwood, because all these companies, as has been stated, were organized under the Train Railway Act, and their powers and their rights must be construed solely with reference to the act under which the original companies were incorporated. So far we are dealing with the interpretation of the Statutes relative to the *powers of the Council to agree upon a particular rate for a definite period of time.*

The case of Detroit Citizens' Street Railway Co. vs. Detroit, 64 Fed. Rep., 628 (26 L. R. A., 627), is in consonance with these views. Judge Lurton said:

"That public streets are a public trust, to be held and preserved for legitimate street uses, is an obvious truth. That the ordinary power to control the public streets usually conferred upon all municipal governments will not justify a diversion to other uses nor support a delegation of the power of control to others, or any abridgement of the legislative authority of the city over the streets, is well settled law. * * * Whether such general powers will authorize a consent in perpetuity or for a definite term is doubtful. The weight of authority seems to be that any grant of an easement for a definite time operates as an abridgement of the legislative power of control over the streets, and would not be an exercise of the legislative powers conferred by the charter. This view is strongly supported by the New York authorities, as well as many others. Davis vs. New York, 14 N. Y., 506; Mithau vs. Sharp, 27 N. Y., 611, 84 Am. Dec. 314; New York vs. 2nd Av. R. Co., 32 N. Y., 272. These cases seem to proceed upon the theory that the grant of any easement in the streets is the conveyance of a property interest commensurate with the purpose for which it is to be used, and therefore irrevocable, unless that power is reserved. In New York vs. 2nd Ave. R. Co., cited above, the court drew a very sharp distinction between the legislative and contractual powers, saying that: "The rights to create and establish ferries and railroad franchises are quite distinct and separate from their duties as legislatures, having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer

property, and subject to the operations of such ordinances and by-laws as may be lawfully passed." 32 N. Y., 271.

It is to be also observed that the early decisions of that state did not recognize a street railway as an ordinary street use, but a new burden upon the fee. The cases are reviewed in Fobes vs. Rome, W. & O. R. Co., 121 N. Y., 505, 8 L. R. A., 453. Other cases holding that the general power of controlling the streets will not support a consent to their use in perpetuity or for a term of years are People's Pass. R. Co. vs. Memphis, 4 Coldw., 406; Louisville City R. Co. vs. Louisville, 8 Bush., 415; Eichels vs. Evansville Street R. Co., 78 Ind., 261; State vs. Trenton, 36 N. J. L., 79; Nash vs. Lowry, 37 Minn., 263; Lake Roland Elev. Co. vs. Baltimore, 77 Md., 352, 20 L. R. A., 126. The question is an open one in Michigan. In view of the strong constitutional policy of that state in favor of local control of matters purely local, to be hereafter more fully referred to, it is not impossible that the courts of Michigan, if the occasion shall arise, will refuse to follow the New York cases, in view of the widely differing policies of the two states in the matter of legislative control over purely municipal interests

We do not think it necessary to decide this question, inasmuch as the case must turn upon a consideration of other legislation more definitely bearing upon the power of the city to grant a vested easement.

In the interpretation of the legislation hereafter to be considered, we shall make further reference to these charter powers; but we shall, for the purposes of this case, assume that further power was necessary to support a permission to use the streets granted for a term of years."

Again, "To the practical operation of a street railway, three things were essential under the law of Michigan. These were:

First. Corporate capacity; this, because under the law of that statute there seems to have been no provision by which natural persons could directly acquire the other requisite franchises.

Second. A franchise to operate the road *and take tolls.*

Third. A right to occupy particular streets with the necessary tracks and equipments.

These three requisites are distinct and separable. The first two are essentially franchises which could only come from the state; the third and equally essential requisite could not come from the state, and, if acquired at all, must come from the municipality within which it was proposed to exercise its substantial franchises. This conclusion is rested on the limitation imposed upon the legislative powers of the state concerning purely municipal interests."

This case turned upon the construction of the word "consent," contained in the street railway statute, and was limited by Judge Larton to its application to a right to occupy particular streets with the necessary track and equipments, and did not embrace the two first propositions, viz.: First, the corporate capacity, and, second, to operate the road and take tolls. He says:

"Our conclusion upon this branch of the case is:

"First. That the legislature meant, by the term 'consent,' no more and no less than would be meant by 'right of way' or 'easement.' 'Consent,' in the connection used, is synonymous with 'easement' or 'right of way.'"

The Learned Judge seemed to be strongly impressed with the ideas of home rule or local self government. After quoting certain constitutional provisions, he says:

"From these constitutional limitations a policy favorable to local self government is plainly deducible; and, in the interpretation of legislative provisions designed to confer

power over purely local concerns, consideration should be given to this state policy, as well as to the fact that the legislature ought, in the interest of local government, to confer a wide discretion upon municipalities, being itself incompetent to legislate directly upon such concerns. It is evident *that the legislature* could not grant to any street railway the right to construct and operate its road upon any particular street. It may provide for the incorporation of such companies, and endow them with the franchises necessary. For the necessary *street rights* they must be referred to the only authority which can grant such privileges,—the local government of the municipality in which it is proposed to operate such road."

This was decided in 1894. Two years later the Detroit Citizens' Street Railway Company, in Street Railway Company vs. City of Detroit, 110 Mich., 384, filed a bill in the state court against the City of Detroit and the Detroit Railway, to restrain the city and the Detroit Railway from carrying out the provisions of an ordinance for the construction and operation of a street railway line. The complainant company claimed to have a prior right to construct and operate a street railway in such streets by virtue of an ordinance of the city of November 24, 1862,—the same ordinance that is in controversy here. The grantees are, by the provisions of the second section of this ordinance *exclusively* authorized to construct and operate railways as herein provided. The contention of the plaintiff was the same as its contention here, that the adoption of the two ordinances giving to the Detroit Railway the right to build its railway in certain streets was in violation of the exclusive grant to the complainant under the ordinance of November 24, 1862.

The holding of the court in that case was against the contention that the city possessed any inherent power over its

streets, the court holding that municipal corporations derive their sole source of power from legislative enactment; that the policy of local self-government is fully discussed by Mr. Justice Lurton in the preceding case, did not obtain to the extent to which the Learned Judge in that case held, and after thoroughly discussing the Train Railway Act and Street Railway Act, the court said:

"We think the act in question cannot be construed as conferring the power upon the Common Council to grant such a privilege as that which was attempted to be conferred by the ordinance of 1862. Certainly there is no express grant of the right to confer exclusive privileges, nor do we think there is any clear implication of any such power arising out of the terms of the act. There is a limitation upon the right of the company to construct a railway, which is that, before doing so, the company shall procure the *consent* of the municipal authorities *under such regulations and upon such terms and conditions* as said authorities may from time to time prescribe. Fairly construed, this language relates to the terms and conditions to be prescribed for the *contemplated occupancy of the streets*, the use of which is presently contemplated by the parties to the contract, and the 'terms and conditions' relate to such occupancy of such streets. A broader construction is contended for, and it is said that the power to make *terms and conditions* carries with it an implication of power to make all *terms and conditions* relating to the subject matter necessary to effectuate the subject of the legislation."

Had this case been decided before the one in the Federal Court, and the state policy clearly announced, it is very probable that under the rule that United States courts follow the ruling of the state court in the construction of state statutes, the decision in the Federal case would have been otherwise. Surely, if under the doctrine of the Michigan case the city could not grant the exclusive right for a term

of years to this railway company, it certainly could not grant the right to a fixed and definite rate of fare for a like term of years. If, as Judge Lurton said, the right to take tolls is a franchise which comes from the state, and if the words "consent" and "terms and conditions" relate to occupancy of streets, as held in both of the above cases, then they are not broad enough to cover the franchises which Judge Lurton says may come from the state alone.

This Court, in Detroit Citizens' Street R. Co. vs. Detroit Railway, 171 U. S., 48, construed the ordinance of November 24, 1862, under consideration here. It was there claimed that the Railway Co. acquired the exclusive right to own and operate railways in the streets of the City of Detroit; the ordinance assumed to give such rights. (See Sec. 2, R., p. 27.) This Court said:

"It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the Constitution, which if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future

should be committed and bound by the conditions of the present time and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in:

> Minturn vs. Larue, 64 U. S., 23 How. 436 (16:575);
> Wright vs. Nagle, 101 U. S. 791, (25:921);
> State (Atty. Gen.) vs. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262;
> Parkhurst vs. City of Salem, (Parkhurst vs. Capital City R. Co. 23 Or. 471), 32 Pac. 304;
> Saginaw Gaslight Co. vs. Saginaw, 28 Fed. 529, decided by Mr. Justice Brown of this court;
> Long vs. Duluth, (49 Minn. 280), 51 N. W. 913;

See also:

> Grand Rapids Elec. Light & Power Co. vs. Grand Rapids Edison E. L. & Fuel Gas Co., 33 Fed. 659, opinion delivered by Mr. Justice Jackson at circuit.

As bearing on the rule, see also:

> Oregon Railway & Nav. Co. vs. Oregonian Railway Co., 130 U. S. 1 (32:837);
> Central Trans. Co. vs. Pullman's Palace Car Co., 139 U. S. 24 (35:55).

The power therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in Grand Rapids Electric Light & Power Co. vs. Grand Rapids, Edison E. L. & Fuel Gas Co., supra, says: "That municipal corporations * * * possess and can exercise only such powers as are 'granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred or those essentials to the declared objects and purposes of the corporation, not simply convenient, but indispensable.'" The italics are his. This would make "necessarily implied" mean inevitably implied. The Court of

Appeals of the Sixth Circuit, by Circuit Judge Lurton, adopts Lord Harwicke's explanation, quoted by Lord Eldon, in Wilkinson vs. Adam, 1 Ves. & B., 466, that a "necessary implication means, not natural necessity, but so strong a probability of intenton, that an intention contrary to that, which is imputed to the testator (the party using the language), cannot be supposed." If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark; or if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the Common Council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough—would have been natural under any Constitution not prohibiting it, and the power to prescribe the terms and regulations of the occupation derive very little, if any, breadth from the expression of it. But assuming the power to prescribe terms does acquire breadth from such expression, surely there is sufficient range for its exercise, which stops short, or rather does not extend to granting an exclusive privilege of occupation. Surely there is not so strong a probability of an intention of granting so extreme a power that one contrary to it cannot be supposed, which is Lord Hardwicke's test, or that it is indispensable to the purpose for which the power is given or necessarily to be implied from it, which is the test of the cases. The rule is one of construction. Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose, from the general purview of the act which confers it. A municipality is a governmental agency—its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the

distinctions which are recognized as important in the administration of public affairs.

Easements in the public streets for a limited time are different and have consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently, those given in perpetutity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indspensable to them."

II.

THE TERMS EMPLOYED IN THE VARIOUS ORDINANCES DO NOT CONSTITUTE A CONTRACT. THE LANGUAGE EMPLOYED TO MAKE A CONTRACT MUST BE OF SUCH A CLEAR AND UNAMBIGUOUS CHARACTER THAT IT WILL ADMIT OF NO REASONABLE CONSTRUCTION CONSISTENT WITH THE RESERVATION OF THE POWER.

The Detroit Citizens' Street Railway Company is operating under the following ordinances:

Detroit City Railway Company, R., page 29; Grand River Street Railway Company, R., page 54; Dix Avenue Railway, R., page 63; Highland Park, R., page 67, and is controlling either by purchase or lease, the Fort Wayne & Elmwood Railway, R., page 158.

All rates of fare provided in these several ordinances for any distance *shall not exceed five cents in any one car.*

By Section 19, "It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railway."

These several ordinances are entirely silent concerning any power reserved in the Common Council to amend or repeal, except such reservation as is contained in Section 19 aforesaid. We need not now deal with the question whether it would be competent for the Common Council to change the rates of fare in the case like that of the Detroit Railway Company, where it is expressly agreed that during the continuance of the term for which the franchise is granted that the rates of fare shall not be reduced, but for the present shall only deal with the question whether the existing ordinances constitute a contract between the city and the railway company, that the railroad company may charge such rates of fare as it may see fit to adopt, not exceeding the maximum rate specified in the ordinances. Our contention is that the ordinances do not constitute such contract. If it were competent at all for the Common Council to make a valid and binding arrangement with the railway company by which, for a fixed and definite term of years, the rates of fare should not be reduced, that the right of the city to regulate fares for the time being surrendered, the language employed must be of such clear and unambiguous character that it will admit of no reasonable construction consistent with the reservation of the power, for it is a well settled rule, as will be hereafter shown, that all intendments and construction must be in favor of the public and against the contention of the railroad company. Stone vs. Trust Co., 116 U. S., 636.

It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. Baltimore & Ohio Railroad Company vs. Maryland, 21 Wall, 456; C., B. & Q. R'y. vs. Iowa; P. Peik vs. Chi-

cago & N. W. R'y. Co., and Winona and St. Peter R'y. Co. vs. Blake, 94 U. S., 155; Ruggles vs. Ill., 108 U. S., 531.

This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all; it can only be by words of positive grant or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank vs. Billings, 4 Pet., 560. "Its abandonment ought not to be presumed in a case in whch the deliberate purpose of the state to abandon it does not appear."

This rule is elementary, and the cases in our reports where it has been considered and applied are numerous. Thus, in Providence Bank vs. Billings, it was held that the incorporation of a bank without any special provision for taxation did not imply a contract on the part of the state not to tax at all.

In Charles River Bridge vs. Warren Bridge, 11 Pet., 419, the court said this rule of construction was not confined to the taxing power, and accordingly it held that the charter of a toll bridge company did not imply a contract not to allow the building of another bridge in the immediate vicinity which would materially interfere with its revenues. In delivering the opinion of the court, Chief Justice Taney used this language:

"This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation for the purpose of building the bridge, and establishes certain rates of toll which the company are authorized to take; this is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below the bridge; no right to erect another bridge themselves nor to prevent other persons from erecting one; no

engagement from the state that another shall not be erected, and no undertaking not to sanction competition, nor to make improvements that may diminish its income."

In Minott vs. P. W. & B. R'y. Co., known as the Delaware Railroad Tax Case, 18 Wall., 206, it was held that a provision in the charter that the railroad company "should pay annually into the treasury of the state a tax of one-quarter of 1 per cent on its capital stock of $400,000," without any words "indicating the intent of the legislature that no further or different tax should be subsequently levied," was not sufficient to show a contract binding the state not to make such a levy; the court remarking that "The surrender, when claimed, must be shown by clear and unambiguous language which will admit of no reasonable construction consistent with the reservation of the power." So in Bailey vs. Magwire, 22 Wall., 215, it was held that a clause in a charter which subjected a corporation to taxation at the rate assessed by the state on other real or personal property of like value, did not relieve the company from taxation for other than state purposes. And here the court said:

"Silence on such a subject," that is to say, taxation for other purposes, "cannot be construed as a waiver of the right of the state in this regard. There must be something said which is broad enough to show clearly that the legislature intended to relieve the corporation from a part of the burdens borne by other real or personal property."

In Fertilizing Co. vs. Hyde Park, 97 U. S., 660, it appeared that a company had been incorporated with authority to establish and maintain for fifty years, "chemical and other works at the place designated * * * for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, or into other chemical products, by means of chemical or other processes;" but this court held

that the state was not thereby prevented from causing the works to be abated in case they should, within the time of the charter, become a public nuisance because of the growth of population in the neighborhood; and among the reasons assigned for the absence from the charter of any express exemption of the company from the operation of the powers of the state, applicable to its existing condition for the time being.

In Newton vs. Com'rs, 100 U. S., 548, the seat of justice of a county had been fixed at Canfield, but the statute by which this was done provided, "that before the seat of justice shall be considered permanently established at Canfield," the citizens should donate a lot and make certain provisions for the erection of public buildings thereon. The citizens complied with all the requirements of the law, and the seat of justice remained undisturbed at the place where it had been "permanently established," until 1874, when a law was passed for its removal to another town. The citizens of Canfield then caused a bill to be filed for an injunction restraining the county commissioners from effecting the removal, on the ground that the original Act and what was done under it constituted an executed contract on the part of the state that the seat of justice should remain forever at Canfield, and the latter act impaired the obligation of that contract; but the court held otherwise, saying, among other things:

"If the legislature had intended to assume an obligation that it should be kept there in perpetuity, it is to be presumed it would have said so. We cannot, certainly not in this case, interpolate into the statute a thing so important which it does not contain."

In Georgia R. R. & Banking Co. vs. Smith, 128 U. S., 174, by an Act of the Legislature of Georgia, passed December 2, 1833, the railroad company was incorporated under the name

of the Georgia Railroad Company, and empowered to construct a rail or turnpike road from the City of Augusta, with branches extending to certain towns in the state, and to be carried beyond those places in the discretion of the company.

The 12th section of the charter, among other things, declares that, "The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; provided, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles; and five cents per mile for every passenger.

In 1879 the legislature passed an act providing for the appointment of a commission to regulate tariffs, etc. This commission prescribed rates for the transportation of freight and passengers by railroad companies in the state which were less than the maximum of the rates authorized by the 12th section of the charter of the company. The company filed its bill against the railroad commissioners and the attorney general of the state, contending, among other things, that the charter of the company is a contract between it and the state of Georgia, and that by it the company has the right to charge any rates for freight and passengers not exceeding those limited in the 12th section of the charter, and that the act of October 14th, 1879, is in conflict with the clause of the Constitution of the United States, which prohibits a state from passing any act impairing the obligation of a contract. They prayed that the bill might be declared null and void, and inoperative against them, and that the commission may be enjoined from prescribing rates of fare over the railroad of

the company and its branches, or from otherwise enforcing the provisions of the act. To this bill the defendants demurred. The court sustained the demurrer and dismissed the bill. The case was taken to the Supreme Court of the state and the decree was affirmed. It was then removed to the Supreme Court of the United States.

Mr. Justice Field, in delivering the opinion of the court, said referring to the charter: "It contains no stipulation, nor is any implied, as to any future action of the legislature. If the exclusive right remains undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, nothwithstanding any altered conditions of the country in the future, the legislature had, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated.

It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligations of contracts. If the charter in this way provides that the charges, which the company may make for its services in the transportation of persons and property, shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state. There is no such language in the present case. The contention of the plaintiff in error therefore fails, and the judgment must be affirmed.

In L. & N. R. R. Co. vs. Ky., 161 U. S., 685 (854), the original charter of the L. & N. Co., granted in 1850, authorized the company to construct a road from Louisville to Nashville; but with no power to extend its lines, or to purchase lines, or to consolidate with other roads. The charter contained no reservation of power to alter or amend. By an Act of March 7th, 1854, the company was given power to *unite* their road with any other road connecting therewith, upon such conditions as the two roads might agree upon. The court held, that the important power to purchase or consolidate with another line cannot be inferred from any such indifferent language as "to unite or connect with such road." Mr. Justice Brown, in delivering the opinion of the court, said: "In construing this section we are bound to bear in mind the general rule so often confirmed by this court, that 'all doubts with regard to authority granted in a corporation charter are to be resolved against the corporation, and that a surrender of the power of the legislature in any matter of public concern must not be presumed from uncertain or equivocal expressions."

In Wheeling vs. Belmont Bridge Co., 138 U. S., 287 (967), the Bridge Company contended that a contract existed between the citizens of Virginia and the defendant, that it should have and enjoy during its charter existence the exclusive privilege of transporting persons across the Ohio River, *at all points within half mile of the location of the ferry;* that the State of Virginia became a party to the contract, and is bound by it; but, that the legislature of the state, not regarding its obligation, in March, 1882, passed an act providing that a corporation might be formed for the purpose of erecting and maintaining toll bridges over the Ohio River, and that no ferry privileges or franchises should preclude the location of such bridge or bridges or entitle the owner to damages by reason thereof. The Bridge Company claimed that

the act of West Virginia was unconstitutional and void, as impairing the obligation of the contract between West Virginia and Virginia and the company. Mr. Justice Field, in delivering the opinion of the court said: "Nor did the charter of the defendant contain any inhibition upon the state to authorize the establishment of another bridge within the distance claimed, whenever the public interest should require it. To allege surrender or suspension of the power of government respecting any matter of public concern, must be shown by clear and unequivocal language. It cannot be inferred from any inhibition upon particular officers, or special tribunals, or from any doubtful or uncertain expression. As was said in substance in the case of Charles River vs. Warren Bridge, 36 U. S. (11 Peters), 425, "Whenever it is alleged that the state has surrendered or suspended its power of improvement for public accommodation on any important line of travel along which a great number of persons must daily pass, the public has a right to insist that its surrender or suspension shall not be admitted in a case in which the deliberate purpose of the state to make such render does not appear. (Referring to several adjudications of this court in support of the doctrine.) And whatever of exclusiveness there was in the privilege extended by the act of 1840 within a half mile on each side of that established ferry, *was repealed in 1882*. From that time the defendant could claim no exclusive privilege to transport passengers, etc., over the Ohio River within the distance mentioned in the repealed statute, even if it could have done so before."

In Slidell vs. Grandjean, 111 U. S., 412 (321), the court said: "It is a familiar rule of construction, that where a statute operates as a grant of public property to an individual or a relinquishment of the public interest, and there is a doubt as to the meaning of its terms or as to its general purpose,

that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the state. As a reason for such a rule it is often stated, that such acts are usually drawn by interested parties, and they are presumed to claim all that they are entitled to. The rule has been adopted and followed by this court in many instances in the construction of statutes of this description." (Pages 329-30.)

In Minott vs. P. W. & B. Ry. Co., 85 U .S. (888), 18 Wall. 206, it was contended by the company, that the provision in the act of Delaware by which the W. & S. Railroad Company was united with the D. & N. R. R. Co., that the new company "should pay into the treasury of the state a tax of one-quarter of one per cent on its capital stock of four hundred thousand dollars," being accepted by the stockholders of the two companies by their union into one company, constituted a contract between the new company and the State of Delaware which precluded that state from imposing any greater or different tax upon the capital stock of the new company. They contended that a charter of a private corporation was a contract between the state and the corporation, and within the provision of the Constitution inhibiting the legislature from impairing the obligation of contract. Mr. Justice Field said, "But before any such exemption or limitation can be admitted the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed. Nothing can be taken against the state by presumption or inference. The established rule of construction in such cases is that 'rights, privileges, or immunities not expressly granted are reserved.' There is no safety to the public interest in any other rule; and with special force does the principal upon which the rule rests apply when the right, privilege or immunity claimed calls for an

abridgement of the powers of government or in restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, 'The whole community is interested in retaining it undiminished, and has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon does not appear.' If the power were not already adjudged, it would admit of careful consideration whether the legislature of the state can surrender this power and make its action in this respect binding upon its successors, any *more than it can surrender its police power or its right of eminent domain.* In the same opinion, Mr. Justice Field cites with approval the case of Commonwealth vs. Bank, 10 Penn., 451. In that case the Eastern Bank had been chartered under the general law which prescribed the payment of taxes on its dividend at a fixed rate. A subsequent statute increased that rate, and it was argued as here, that the designation in the original act created a contract on the part of the state that no additional tax should be laid, and that the later acts therefore impaired the obligation of contract. But the court held, that the designation in the original act was nothing more than a simple declaration of the tax then to be paid by the Bank, and did not give the slightest intimation of an agreement or an understanding that the tax should not be increased during the existence of the charter. "To deduce from promises so insufficient a consequence of such magnitude, would indeed be a gross violation of the wholesale principle that, an abandonment of the power of taxation is one to be established by clearly showing this to have been the deliberate purpose of the state."

In Bailey vs. Maguire, 89 U. S., 215 (858), a suit in equity was brought by foreign stockholders to restrain the collection of certain taxes in Missouri assessed against the Pacific Rail-

road Co. by the county assessors for the year 1869, on the ground that the property of the company is exempt from all taxation, except a state tax, to be ascertained and paid in a particular manner. This exemption was claimed under the Act of December 25th, 1862, which amongst other things provided, that the road shall be exempt from taxation until the same shall be completed, opened and in operation and shall declare a dividend; when the equipment shall be subject to taxation at the rate assessed by the state on all other real and personal property of like value. The question presented in this case was, whether the state was precluded from providing another mode of valuation for state taxes. Mr. Justice Davis, writing the opinion, said: "While it were better for the interests of the community that this power should on no occasion be surrendered, this court has always held, that the legislature of the state, unless restrained by constitutional limitations, has full control over the subject, and can make a contract to exempt its property from taxation, either in perpetuity or for a limited period of time. If, however, on any fair construction of the legislation there is a reasonable doubt whether the contract is made out, this doubt must be resolved in favor of the state. In other words, the language used must be of such a character as, fairly interpreted, leaves no room for controversy. It is conceded that this exemption is not granted in express terms, but it is argued, that taking the whole section, it arises by necessary implication. We do not think so." * * *

In Covington & L. Turnpike Road Co. vs. Sanford, 164 U. S., 578 (560), decided in October, 1896, the General Assembly, by an act approved May 24th, 1890, made it unlawful to demand, charge, collect or receive tolls in excess of rates specified in that act. The company announced its purpose to disregard the provisions of the act, and to charge such tolls

as was prescribed by the prior statute. The appellees, who were people who were living on or near the turnpike road, were accustomed to travel on it daily, brought this suit for an injunction restraining the appellant from exacting tolls in excess of those fixed by the act of 1890. A temporary injunction in accordance with the prayers of the petition was granted, and the company filed its answer. The principle questions are:

(1) Whether the act of 1890 impairs the obligation of any contract that the turnpike company had with the state touching the matter of tolls;

(2) Whether, independently of any question of contract, the act made such a reduction in tolls as to amount to a deprivation of the company's property without due process of law. * * * The Covington & Lexington Turnpike Co. was incorporated by an act approved in 1834; with authority to construct a turnpike. By the 19th section of the act, the company was authorized to collect certain specified tolls. The 20th section provided, that if at the expiration of five years after the said road has been completed, it shall appear that the annual net dividends for the year next preceding of said company upon the capital stock expended upon said road and its repairs shall have exceeded the average of 14 per cent. per annum, then and in that case, the legislature reserves to itself the right upon the facts being known, to reduce the rate of toll so that it shall give that amount of dividend per annum, and no more."

Mr. Justice Harlan, giving the opinion, said: "Whatever authority therefore the General Assembly had by statute to regulate the tolls of the plaintiff in error, arise from the general power to regulate the affairs of a corporation which came into existence under its authority; and which owned and controlled a highway established for the public use."

Was the Covington & Lexington Turnpike Road Co. entitled under its charter to be exempt from legislation that would prevent it from earning at least 14 per cent. upon the capital stock expended upon said road and repairs, as prescribed in the act of 1834?

"An exemption or immunity from taxation so vitally affects the exercise of powers so essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is not sustained unless it has been given in language clearly and unmistakably evincing the purpose to grant such immunity of exemption. All doubts upon the question must be resolved in favor of the public. * * * * The same principle should be recognized when the claims is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the State, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that a State should retain its control of tolls upon the public highway, as it is that it should not surrender or fetter its power of taxation. * * * It is settled law, that in grants by the public, 'nothing passes by implication;' and if a contract with the State relating to the exercise of franchises is susceptible of two meanings, the one restricting and the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the State. * * * Nor ought this Court, in the absence of express enactment after a lapse of more than half a century with legislation not only severing the old corporation, but regulating the rate of toll of these roads, hold that this immu-

nity from legislative interference was a perpetual right in the nature of a contract that could not be disturbed. For the reasons stated, we are of the opinion, that when the act of 1890 was passed, the power of the General Assembly over the subject of tolls to be exacted by the plaintiff in error was not impaired or restrained by any contract with the state with reference to the amount which the company might earn from the use of its road."

In Stein vs. Bienville, Water Supply Co., 141 U. S., 36 (622), a grant under legislative authority of an exclusive privilege for a term of years to supply the municipal corporation and its people with water drawn by means of a system of water-works from a particular stream or river, was held, not to prevent the State from granting to other persons the privilege of supplying during the same period the same corporation and people with water drawn in like manner from a different stream or river. The Court said: "If the contract under which the plaintiff claims was doubtful in its meaning, the result would not be different; for, while it is the duty of the courts not to defeat the intention of the parties to a contract by a strained interpretation of the words employed by them, it is a settled rule of construction, that 'In grants by the public nothing passes by implication; and if on a fair reading of the instrument reasonable doubts arise as to the particular interpretation to be given to it, these doubts are to be resolved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. Guided by this rule—in respect to which there is no difference of opinion in the courts of this country—we are forbidden to hold, that a grant under legislative authority of an exclusive privilege for a term of years of supplying a municipal corporation and its people with water, either by a particular sys-

tem of waterworks or from a particular stream or river, would prevent the State from granting to other persons the privilege of supplying during the same period the same corporation and people with water, either in a like manner, or from a different stream or river."

In Winchester & Lexington Turnpike Co. vs. Croxton, 33 L. R. A., 177, Judge Hazelrigg, delivering the opinion of the court, said: "The question on this appeal is whether or not the appellant had a contract with the State entitling it to collect the tolls fixed in its charter of 1834, in spite of the legislative act of 1893, fixing uniform rates for all turnpikes in the State and which are less than those fixed in the company's charter. To the suit of the appellee for moneys collected of him under the charter rates, in excess of the rates fixed by the recent general act, the company answered, relying on Sections 15 and 21 of its charter as showing an irrepealable contract, which sections are as follows:

Section 15. "It shall be lawful for the president and manager * * * to collect and receive of and from all and every person or persons using said roads the tolls and rates hereinafter mentioned, and to stop any person riding, leading or driving any horse, etc., * * * until they shall have paid toll agreeably to the following rates, to wit: For every twenty head of sheep, hogs or other small stock, six and a fourth cents," etc.

Section 21. "And if at any time it shall appear that the clear income and profits will not yield a dividend of 6 per centum per annum on the capital stock so expended from the time of investing the same, that it shall and may be lawful for the president and manager to increase the toll herein allowed, so on each and every allowance thereof, as will raise the dividend up to 6 per centum per annum; and if at any time it shall appear by the said abstracts that the said income and profits will yield a dividend exceeding 12 per centum per annum, then the said tolls shall be reduced so as to reduce the

dividend down to 12 per centum per annum." These are the only provisions particularly pleaded in the answer, though the charter is referred to and made part of the pleading. As explanatory of the reference to certain abstracts in the section last quoted, it is proper to notice Section 20, which reads as follows: "That the president and manager shall, at least once in every year after the company shall be organized, lay before the general assembly of the commonwealth of Kentucky during their session an abstract of their accounts, showing the amount of their capital expended in prosecution of their works and of the incomes and profits, arising from the said tolls for and during the said respective periods, together with an abstract account of the costs and charges of keeping the said road in repair, and all other contingent charges and costs, and such other information respecting the company and their progress as they may think necessary to the end that the clear annual income and profits thereof may be ascertained and known."

"The question is, Do the provisions of the charter evidence an irrevocable contract between the State and the corporation? We have here a private corporation, and the law would ordinarily denominate its charter a contract, within the meaning of the Federal Constitution between the State and the corporation; and any alteration or modification impairing it would be repugnant to both State and Federal Constitutions. Ordinarily, to authorize such alteration, there must be an express reservation of power to make it. But the property of the corporation in this instance, is affected with a public use. Its corporate nature is essentially public, and the rule is, that the charters of such corporations are not protected from legislative interference, unless, in unmistakably clear language, the State has indicated a deliberate purpose not to interfere for all time to come. In the case of private corporations, the reservation, if available, must be expressed in the charter; in the case of public corporations, or

those essentially public, the *reservation is understood*, unless negatived by express words or necessary implication. As said in Delaware Railroad Tax Case, 45 U. S., 18 Wall., 225, 21 L. ed., 894: "The established rule of construction in such cases is that rights, privileges and immunities not expressly granted are reserved." And the language of a company's charter, requiring it "to pay annually into the treasury of the State a tax of one-quarter of 1 per cent. upon its capital stock" was held not to evince an intention on the part of the State to surrender its reserved power to impose, subsequently, a further or different tax. In Stone vs. Farmers' Loan & Trust Co., 116 U. S., 325, 29 L. ed., 642, the language involved was: "That it shall be lawful for the company hereby incorporated from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad," etc. The contention was, that "the state granted to the company, for the full term of its corporate existence—that is to say, forever—the right of managing its own affairs and regulating its charges * * * free of all legislative control." The claim was denied in an elaborate opinion, citing numerous decisions of that court on the subject which need not be referred to here.

It is true, as noted by counsel, that the court, in the case last cited, said that the power granted was limited by the rule of the common law, which required all charges to be reasonable, and that shall be deemed reasonable in law was nowhere indicated; that no rate was specified, nor any limit set. And it is also true that the State, in the case at hand, did indicate what would be reasonable, and did set a limit; but we cannot agree with counsel that thereby nothing was left for future determination by the legislature. The determination by the State that, for to-day, or for an indefinite time in the future, the charge of 6¼ cents for every twenty head of sheep driven through the gates of the company would be a reasonable charge, is not a final settlement

or determination of what may be reasonable sixty years hence. And the exercise, once, by the State, of the right to fix the rate at what was then deemed reasonable is not, in itself, exhaustive of this power. Admittedly, if the rate fixed is reasonable, the legislature will so declare; but what is reserved? What is it that the public is interested in reserving? Manifestly, that the rate should be reasonable, and what was to be deemed reasonable in the future the legislature was to decide, whenever it chose to act, just as it exercised the right in the first instance. It is precisely as if, in front of the company's charter the State had written: "I grant you the right to charge certain fixed rates, and these may be increased or diminished within certain limits, according as you make 6 or 12 per centum per annum on the capital invested. These rates and the profits are reasonable, but I go no further. I do not say I shall always regard them as reasonable. I reserve, as I do not expressly barter away, the power to provide reasonable rates for the travelling public of the future." If the State had meant otherwise, it would have said that the rates as fixed herein shall remain unchanged forever; and to sustain appellant's contention, these important words must be interpollated into the charter. And this is true, not only with reference to the special rates of toll fixed, but to the specified minimum and maximum rates of interest as well. The fixing of the tolls and the rates of interest allowable was but an expression of the legislative will that such tolls and such rates of interest were for the time being reasonable and lawful; and there is no promise, express or implied, that further and future regulations are finally abandoned by the State. In the Stone Case, 116 U. S., 307, 29 L. ed., 636, are cited cases where the character of the language used imported a contract. Thus, in Gordon vs. Appeal Tax Ct., 44 U. S., 3 How., 133, 11 L. ed., 529, the statute says: "That upon any of the banks in this state complying with the conditions of this act,

the faith of the state is hereby pledged not to impose any further tax or bonus on the said banks during the continuation of their charters under this act." Language equally strong and explici was used in the case of Piqua Branch of State Bank vs. Knoop, 57 U. S., 16 How., 369, 14 L. ed., 977; Proprietors of Bridges vs. Hoboken Land & Imp. Co., 68 U. S., 1 Wall., 116, 17 L. ed., 971; and in Home of the Friendless vs. Rouse, 75 U. S., 8 Wall., 430, 19 L. ed., 495, to indicate that the State meant to preclude itself forever after from legislative interference with rights and privileges granted. We are convinced that the general assembly intended, by the charter in question here, merely to indicate the rates of toll then supposed to be reasonable, and to provide for a like reasonable profit in the way of interest, without abandoning forever its power to exercise control over and limit the rates of toll and the profits of the company in the future.

The doctrines that the State reserved to itself its governmental functions and powers of further regulating the property and franchises of corporations created by it, when the public were affected, was announced as early as in 1830 in the case of Providence Bank vs. Billings, 29 U. S., 4 Pet., 514, 7 L. ed., 939, and we have no reason to believe that the representatives of the State contracted in ignorance of this principle. In Georgia R. & Bkg. Co. vs. Smith, 128 U. S., 174, 32 L. ed., 377, the language of the charter, adopted in 1833, was "that the charge of transportation or conveyance shall not exceed 50 cents per hundred pounds on heavy articles, and 10 cents per cubic foot, on articles of measurement, for every 100 miles; and 5 cents per mile for every passenger." The Supreme Court, by Mr. Justice Field, upheld the legislative act of 1879, empowering commissioners to fix the rates of transportation at less than the maximim of rates authorized by the charter, and, in the course of a thorough review of the question, said: "It (the charter) contains no stipulation, nor is any implied, as to any

future action of the legislature. * * * It would require much clearer language than this to justify us in holding, that, notwithstanding any altered conditions of the country in the future, the legislature had, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated. We have considered the question without reference to the case of Com. vs. Covington & C. Bridge Co., 14 Ky. L. Rep., 836, the principles of which are in fact conclusive of this case. That case was reversed by the Supreme Court (154 U. S., 204, 38 L. ed., 962), because a regulation of the tolls on the bridge spanning the Ohio river was held to affect interstate commerce. It was not deemed necessary by that court to discuss the contract features involved; but, whether we regard the opinion of this court in that case as an authoritative precedent, or merely as an argument, it is this court's latest expression of opinion on the subject involved, and we now approve and follow it.

The suggestion that the company is deprived of its property without due process of law is easily disposed of. No intimation is given in the answer of the company as to what effect the proposed reduction of rates will have on the dividends or property of the company. Manifestly, it does not follow that a reduction of rates will cause a reduction of dividends. It may increase them. But, if we concede that the earnings will be decreased, we are not told to what extent the decrease may go. We cannot assume it will amount to confiscation."

In Omaha Horse Railway Company vs. Cable Tramway Co., 30 Fed. Rep. 324, the plaintiff was incorporated under an act of the Legislature of the Territory of Nebraska, with authority to build and operate a horse railway in the streets of the City of Omaha. The act was a special charter. It was approved February 18, 1867. On the 28th of October, 1868,

the City Council of Omaha passed an ordinance granting the plaintiff the right to lay out, construct and operate railways in the streets of the city. The plaintiff entered upon the construction of its works in due time, and has from year to year extended its lines, and at the time this litigation was brought, had over 18 miles of road in operation, with the necessary equipments of cars, etc.

By Section 5 of the charter the plaintiff was granted the exclusive right for fifty years from the first of January, 1867, to build, erect and operate horse railways within the City of Omaha and five miles adjacent.

The defendant was organized under a general act entitled, "An Act to provide for the incorporation of street railway companies within the cities of this state," approved in 1877.

In 1884, under an ordinance of the city, an election was held at which the people gave their consent to the construction and operation by the defendant of a cable tramway in most of the streets of the city, including those on which the plaintiff had then constructed and was operating its lines. A bill was filed by the horse railway company to restrain the cable company and was heard before Mr. Justice Brewer, who said:

"The contention, however, is that at the time of this grant cable roads were practically unknown; that the only known form of street railways was the horse railway; that the terms "street railroad" and "horse railroad" were in common parlance used to describe the same thing; that in construing the grant we are to place ourselves back to the time at which it was made, and these terms 'horse railroad' and 'street railroad' being then used interchangeably for the same thing, we are to suppose that the Legislature meant by the use of one term all that it would have meant by the use of the other, and that therefore all that would to-day be included within either term was within the scope of the grant. The rule for the construc-

tion of legislative grants is well settled. They are to be construed against the grantee and in favor of the public; and nothing passes unless it is obvious that the intent was that it should pass."

He quotes from Perrine vs. Chesapeake & Delaware Canal Co., 9 How. 172, the language of Chief Justice Taney:

"The rule of construction in cases of this description is this, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public; and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable construction, contrary to the obvious intention of the act. It must be fairly examined and considered, and reasonably and justly expounded."

"He who says that the state has given him a franchise, a right to do that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant.

My conclusion from this consideration is that the term 'horse railway' was not used in this grant as significant of any other form of street railway than that which is now known, strictly speaking, as a horse railroad."

Mr. Justice Brown, sitting in this court, in Saginaw Gas Light Co. vs. City of Saginaw, 28 Fed. Rep. 539, said:

"Nothing is better settled than that statutes creating monopolies, granting franchises, and charters of incorporation, must be construed liberally in favor of the public, and strictly as against the grantee. Monopolies are justly regarded as encroachments upon the natural rights of the people, and are viewed with jealousy by courts. Whatever is not equivocally granted in such act is taken to have been withheld. All acts of incorporation, and acts extending the privileges of incorporated bodies, are to be taken most strongly against the companies.

In regard to the rights of franchises, it is said by the Supreme Court that, where the grant is designed by the sovereign power to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government, and therefore the grant is not to be extended, by implication, in favor of the grantee, beyond the obvious and natural meaning of the words employed. Other authorities, putting it sententiously, say that a doubt is fatal to a grant. Thus, where an act of parliament imposed a penalty on all but freemen of the Waterman's Company, for navigating any wherry, lighter, or *other craft*, on the Thames, it was held that a steam tug was not within the description and prohibition of the act. A corporation is strictly limited to the exercise of those powers which are specially conferred on it. The exercise of a corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and the spirit of the act of incorporation. Beaty vs. Lessee of Knowler, 4 Pet. 152.

In Hamilton Gas Light & Coke Co. vs. City of Hamilton, 146 U. S. 258 (1903) it was said:

It may be that the stockholders of the plaintiff supposed at the time it became incorporated and when they made their original investment that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's work for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. As was said by this court in Curtis vs. Whitney, 80 U. S. 13 Wall. 68: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now

in making a large class of contracts, that they may be affected in many ways by state and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public."

And the court in this case re-affirms the doctrine of Stein vs. Bienville Water Supply Company, 141 U. S. 67.

III.

FRANCHISES ARE ALWAYS GRANTED SUBJECT TO THE POLICE POWER.

"The Police Power, in its broadest acceptance, means the general power of the Government to preserve and promote the public welfare, even at the expense of private rights."

Cooley's Constitutional Limitations, 6th Ed., p. 704.

Blackstone defines the Public Police and Economy to be "the due regulation and domestic order of the Kingdom, whereby the individuals of the state, like members of a well-governed family are bound to conform their general behavior to the rules of propriety and neighborhood and good manners, and to decent, industrious and inoffensive in their respective stations."

Black. Com. 162.
Cooley's Constitutional Limitations, 4th Ed., 507.

Or, as defined in New Orleans Gaslight Co. vs. Hart, 8 Am. St. Rep. 544, "It may be said to be the right of a city or of a state functionary to prescribe regulations for the good order,

peace, protection, comfort and convenience of the community, which do not encroach on the like powers vested in Congress by the Federal Constitution."

Or, as was said by Chief Justice Shaw, in Commonwealth vs. Alger, 7 Cush. 84, "We think it is a settled principle growing out of the nature of a well-ordered civil state, that the holder of property, however absolute and unqualified his title, holds it under the implied liability that his use of it shall be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property. * * * Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulations established by law as the Legislature under the governing and controlling power vested in them by the constitution may think necessary and expedient."

It is also thus defined: "The conservation of private rights as attained by the imposition of wholesome restraint upon their exercise. Such a restraint as will prevent the infliction of injury upon others in the enjoyment of it." The power of government to impose this restraint is called the Police Power."

Tiedeman's Limitations of Police Power, Sec. 1.

In 8 A. & Eng. Enc. L. 620 it is said: "The rule established in the Dartmouth College case, that the grant of franchise in the charter of the corporation constitutes a contract, the obligation of which cannot be impaired by subsequent legislation, is settled beyond dispute. * * * Cosely allied to the rule are two other principles equally well settled, and so important in their effect upon it, that they may sometimes seem to qualify the rule. Under the first of these principles, every grant or franchise, being in derogation of common right, receives a

strict construction. Under the second, every charter and the grants it contains is accepted subject to the Police Power of the state, which cannot be bartered away. Finally, the right is now commonly reserved in the state constitutions, the general laws, or the charters themselves, to amend or repeal the charters of a private corporation.

So that, in construing the powers granted or reserved in the particular franchises or agreement, we must bear in mind the foregoing limitations.

It is an accepted doctrine of the law, that under its inherent power, the government may regulate, where necessary for the public good, the conduct of its citizens towards each other, and the manner in which each shall use his own property. Where therefore the owner of property devotes it to a use in which *the public has an interest*, to the extent of that interest the owner's use of it may be controlled by law for the public good.

In Munn vs. Ill., 94 U. S., 113, the question to determine was, whether the General Assembly of Illinois had the power to fix by law the maximum charges for the storage of grain in warehouses at Chicago and other places in the State; and Mr. Chief Justice Waite said: "Under the powers inherent in every sovereignty the government may regulate the conduct of its citizens towards each other, and when necessary for the public good, the manner in which each shall use his own property. It has in the exercise of these powers been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a MAXIMUM CHARGE to be made for services rendered, accommodation furnished and articles sold. Down to the time of the adoption of the 14th amendment to the Constitution of the United States, it was not supposed that statutes regulating

the use, or even the price of the use, of private property, necessarily deprived an owner of his property without due process of law. Under some circumstances it may, but not under all. The amendment does not change the law in this particular. It simply prevents the State from doing that which will operate as such deprivation. When the owner of property devotes it to a use in WHICH THE PUBLIC HAS AN INTEREST, he in effect grants to the public an interest in that use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use. The right of property and to a reasonable compensation for its use, created by the common law, cannot be taken away without due process; *but the law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature.* The great office of statutes is to remedy defects in the common law as they are developed, and to adapt them to the changes of time and circumstances. The limitation by legislative enactment of the rate charged for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law, but only gives a new effect to an old one.

In C., B. & Q. R. R. Co. vs. Cutts, 94 U. S., 155 (94), the appellees filed a bill to restrain the enforcement of a certain statute regulating the rates of fare and freight to be taken by railroads in the State of Iowa. Chief Justice Waite also wrote this opinion. He said: "Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers in order that they may better serve the public in that capacity. They are therefore engaged in a *public* employment for the *public interest;* and under the decision in Munn vs. Illinois, just announced, subject to legislative control as to their rates of fare and freight, unless protected by their charter." The justice further said: "When the legislature steps in

and prescribes a maximum charge, it operates upon this corporation the same as it does upon individuals engaged in similar business. It was within the power of the company to fix permanently this limit and make it a part of the charter, and if it was refused, to abstain from accepting the rate and establishing the contemplated business. If that had been done, the charter *might* have presented a contract against future legislative interference.

In Louisville, etc. Railroad Company vs. Railroad Commission, 19 Federal Rep., 679, it is said: "Rights of property, like social and conventional rights, are held subject to such reasonable limitations in regard to their enjoyment, as shall prevent them from being injurious to the rights of others, and to such reasonable restraints and regulations to be established *by law* as the legislature may from time to time ordain and establish. It is on this principle—applicable alike to all kinds of property—generally dominated the *Police Power* of the State, that the authority is founded for such control over individuals and over their property as is necessary to insure safety to all and to promote the public conveniences and welfare. And in the exercise of this reserved authority the legislature may require railroad corporations and persons operating railroads in the State to observe precautionary measures against accident, forbid unjust discrimination and extortionate charges, and where there is no valid contract to the contrary, prescribe reasonable maximum charges for the services to be performed by them.

In B. & O. R. R. Co. vs. Maryland, 21 Wall., 456 (678), the Supreme Court said: "This unlimited right of the State to charge, or to authorize others to charge, toll, freight or fare, for transportation on its road, canals and railroads arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of

that compensation. That discretion is a legislative and *sovereign* discretion, and in its very nature, is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility of those who for the time being are officially invested with it. In this respect it is like all other legislative power when not controlled by constitutional provisions; and the courts cannot presume that it will be exercised detrimentally."

Stein vs. Farmers' Loan & Trust Co., 116 U. S., 307, was a suit brought by the Farmers' Loan & Trust Company to enjoin the Railroad Commission of Mississippi from enforcing against the Mobile & Ohio Railroad Company the provisions of statutes of that State providing for the regulation of freight and passenger rates on railroads, passed in 1884. In 1848 on the 3rd day of February, the legislature of Alabama passed an act incorporating the Mobile & Ohio Railroad Company. By the 12th section of the charter it was enacted, "that it shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive toll and charges by them to be received for the transportation of persons or property." On the *17th day of February, 1848*, the legislature of Mississippi passed an act to incorporate the Mobile & Ohio Railroad Company. This act recited the incorporation of the company in Alabama, setting out that act of incorporation in full; and also recited that Mississippi was desirous to aid in accomplishing the object of said act. It was provided in said act in Section 1, that "the railroad company when organized shall be granted the same rights, powers and privileges as are granted to it within the State of Alabama." Like acts were passed by the legislature of Tennessee and Kentucky. Each of the last-named acts provided, that the railroad company shall be entitled to all the privileges, rights and immunities granted and prescribed by the State of Alabama. From this it was claimed that the State granted to the

company for the full term of its corporate existence the right of managing its own affairs and regulating its charges for the transportation of persons and property, free of all legislative control. The Court said: "It is now settle in this court, that the State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter. * * * This power of regulation is a power of government *continuing in its nature*, and *if it can be bargained away at all*, it can only be by words of *positive grant* or something which is in law *equivalent*. If there is a reasonable doubt, *it must be resolved in favor of the existence of the power*."

New York & New England Railroad Co. vs. The Town of Bristol, 151 U. S., 556 (269), was error to the Supreme Court of the State of Connecticut, to review a judgment of that court affirming the order of the Railroad Commissioners that a graded crossing in the Town of Bristol should be removed, and directing alterations and changes. It was contended on the part of the company, amongst other things, that the action of the Railroad Commissioners was taking property without just compensation and without due process of law. Mr. Chief Justice Fuller, in delivering the opinion of the Court, said: "It is likewise thoroughly established in this Court, that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contract or the deprivation of property without due process, or of the equal protection of the laws by the states, are not violated by the *legitimate* exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection *cannot be contracted away*. Nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to government regulation in particulars essential to the preservation of the community from injury."

In Boston Beer Co. vs. Mass., 97 U. S., 25 (988), Mr. Justice Bradley said: "Whatever differences of opinion may exist as to the extent and boundaries of the *Police Power* * * * the legislature cannot by any contracts divest itself of the power to provide for these objects."

In Northwestern Fertilizing Co. vs. Village of Hyde Park, 97 U. S., 659 (1036), the company was incorporated by an act of the legislature approved in 1867. The act declared that the corporation should have continued succession and existence for the term of fifty years. The 4th section provided, that "The corporation is hereby authorized and empowered to establish and maintain chemical and other works at the place *designated herein.*" Section 5 provided that the works should be established at any point south of the dividing line between certain townships. The capital stock of the company was Two Hundred Fifty Thousand Dollars, all of which had been paid up. The works were in existence and operation before the village was incorporated. The Common Council adopted an ordinance prohibiting any person from carrying on any offensive or unwholesome business within the limits of the village, nor within one mile of those limits. The Fertilizing Company was convicted of violation of this ordinance, and the bill in this case was filed against the village to prevent any further prosecution, the company claiming that it was protected by its charter from the enforcement of the ordinance against it, and that its charter was a contract within the meaning of the contract clause of the Constitution of the United States. The Court said: "The rule of construction in this class of cases is, that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved aversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is

fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court. * * * The charter was a sufficient license until revoked, but we cannot regard it as a contract guaranteeing in the locality originally selected an exemption for fifty years from the exercise of the Police Power of the state however serious the nuisance might be in effect by reason of the growth of the population around it. The owners had no such exemption when they were incorporated, and we think the charter did not give it to them."

Budd vs. State of New York, 143 U. S. 577 (247). Budd was convicted for a violation of the New York law of 1888, regulating the fees and charges for elevating grain by means of stationary elevators. The judgment was affirmed by the Court of Appeals, and the case removed to the Supreme Court of the United States. The Legislature in 1888 fixed a maximum charge for elevating, receiving and discharging grain, and imposed penalties for the violation of the act. It was claimed by Budd that the statute was unconstitutional, because it deprived the citizen of the property without due process of law. The Court reviewed the numerous cases, both in the State Court and United States Court, where the Police Power of the state had been exercised in controlling the rates of transportation, etc., and re-affirms the doctrine of Munn vs. Illinois, and emphasizes the doctrine, that where a business is charged with a public interest the Police Power of regulation exists. It will be remembered, that in Covington & Louisville Turnpike Road Co. vs. Sanford, supra, it was held, that the authority of the General Assembly had by statute to regulate the tolls of the plaintiff in error, arose from its general power to regulate the affairs of a corporation which came into existence under its authority and which owned and controlled a highway established for the public use. That it is of the highest importance that such control should remain with the

state, and it should not be implied that the legislative department intended to surrender it.

In Southern Pac. Co. vs. Board of Railroad Com'rs, 78 Fed. 230-275, a case heard before Mr. Justice McKenna, then Circuit Judge, the contention was as to the reasonableness of rates fixed by the railroad commissioners of California. In his opinion at page 257 he said:

"Munn vs. Illinois was a case concerning the reduction of warehouse rates,—not so indisputably a public interest as railroads. It established two propositions: (1) That of the power of the state to regulate property devoted to a public use. (2) That the exercise of this power to settle rates of charge was a legislative prerogative, not a judicial one; that is, there was no review of them by the judiciary. * * * * The first proposition, as to the power of the state, has not been overruled. The second proposition, as to its right of exercise without judicial review, has been overruled, and the relations of common carriers and the state established in excellent equipoise." But that part of the second proposition; namely, that the exercise of the power to settle rates of charge, was a legislative prerogative, remains unchanged.

The counsel for the railroad company in that case conceded the power to regulate, but very guardedly defined its limits; and the judge said further:

"The right—abstract right—of the state, therefore, to reduce rates, seems to be a necessity. Whether it should in any case, be exercised or not, is another question. Does the right exist? That I think it does, I may have sufficiently indicated in considering the contentions of respondents, and it is only necessary to give my views more definiteness.

In L. S. & M. S. Railway vs. Smith, decided April 17th, 1899, 19 Supreme Court Reporter, 565, the Court in holding the act of the Michigan Legislature, requiring the company

to sell one thousand mile tickets at specified rates less than the regular rate fixed by law, unconstitutional because such legislation was an unjust discrimination, affirms, however, the doctrine contended for here. It said:

"True it is that the railroad company exercises a public franchise and that its occupation is of a public nature, and the public therefore has a certain interest in, and rights connected with, the property, as was held in Munn vs. Illinois, 94 U. S. 125, and the other kindred cases. The Legislature has the power to secure to the public the services of the corporation for reasonable compensation so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the Legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power."

"There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. * * * In holding this legislation a violation of that part of the constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws, we are not, as we have stated, thereby interfering with the power of the Legislature over railroads as corporations or common carriers to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public. We say this particular piece of legislation does not partake of the character of legis-

lation fairly or reasonably necessary to attain any of those objects, and that it does violate the federal constitution, as above stated.

IV.

THE POLICE POWER CANNOT BE DELEGATED OR BARGAINED AWAY, NOR CAN THE CORPORATION BY ANY CONTRACT HAMPER ITSELF IN THE EXERCISE OF IT.

In Birdsall vs. Clark, 73 N. Y. 73, the plaintiff was the owner of certain premises in the City of Bingham. The Common Council passed a resolution directing the setting of curbstones, and authorized the superintendent of streets, when the owner neglected to do the work, "to cause same to be done." Mr. Chief Justice Church said, "It is a well settled principle, that public powers or trusts devolved by law or charter upon the council or governing body to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. If discretion and judgment are to be exercised, either as to time or manner, the body or officer entrusted with the duty must exercise it, and cannot delegate it to any other officer or person."

In Toledo, Wabash & Western Ry. vs. City of Jacksonville, 67 Ill. 37 (16 Am. Rep. 611), the City of Jacksonville adopted an ordinance which required the railroad company to keep a flagman at a street crossing; and suit was brought to recover a penalty imposed for failure to comply therewith. The Court said: "The right to pass ordinances is claimed under the police power of the municipality. Waiving the question of the power of the city to pass the ordinance without being expressly authorized by the General Assembly, we shall treat the case

as though the city had the right by the grants in its charter to the exercise of the power in the regulation of domestic affairs that the State could do for the general welfare. There can be no question that railway corporations are subject to police regulations as well as private persons. The General Assembly, when the public exigencies require it, has power to regulate corporations in their franchises so as to provide for the public safety. The exercise of this right in no manner interferes with or impairs the power conferred by their act of incorporation." Citing the G. & C. U. R. R. vs. Loomis, 13, Ill. 588; Thorpe vs. Rutland, 37 Vt. 140. * * * "This power is inherent in the city, and it cannot part irrevocably with its control over that which is for the health and safety of society. In Thorpe vs. Rutland R. R. Co., 37 Vt. 140, the Court said: 'We think the power of the Legislature to control existing railways in this respect may be found in the general control over the police of the country which resides in the law-making power in all free states, and which is, by the fifth Article of the Bill of Rights of this State expressly declared to reside perpetually and inalienably in the Legislature, which is perhaps no more than the announcing of the general principle applicable to all free states, and which cannot therefore be violated so as to deprive the Legislature of the power *even by express grant* to any mere public or private corporation.

In Laurel Fork & Sand Hill Railroad Co. vs. West Virginia Transportation Co., 25 W. Va. 324, the plaintiff company was incorporated by an act of the Legislature of West Virginia, passed in 1866. The eighth section of the charter conferred upon the railroad company the right to charge for transportation of persons or produce and other duties, such charges or rates as may be deemed by the plaintiff just, provided that the charges for transporting oil shall in no case exceed the sum of seventy-five cents per barrel.

In 1873 the Legislature of West Virginia passed an Act to establish a reasonable maximum rate of charges, which applied to all railroads within the State, but the maximum rate was fixed at a sum larger than that specified in the eighth section of plaintiff's charter.

The sole question involved in the case, as stated by Mr. Justice Green, the writer of the opinion, was, Did the plaintiff below, the Laurel Fork & Sand Hill Railroad Company, have a right at all times to charge seventy-five cents per barrel for the transportation of oil over the whole length of their road, as authorized by the 8th section of chapter 113 of the Acts of 1866, that act being the original charter of the company, or did the right to make so large a charge for transportation cease after April 1, 1874, when the act of 1872-3 went into effect?

The Court held:

1. Railroad companies are common carriers engaged in a public employment affecting the public interest, and are subject to legislative control as to their rates of fare and freight, just as any natural person, who is a common carrier, is subject to such legislative control. (p. 342.)

2. Railroad corporations, which devote their property to a use, in which the public has a direct interest, in effect grant to the public an interest in such use, and must to the extent of that interest submit to be controlled by that public for the common good, as long as they maintain the use; but they may withdraw the grant by discontinuing the use. (p. 340).

3. There is a marked difference between such corporations as those spoken of in the last point, and purely private corporations. The former may be called quasi public corporations; and the legislature of the State has over the employment of their property so devoted to a use, in which the public has an interest, a control, which it does not have over the employment of the property of a purely private corporation. The legislature

can generally exercise no control, which is forbidden by the charter, of a purely private corporation (p. 341).

4. Though a railroad corporation by its charter is given "the power to contract in reference to its business the same as private individuals," or is authorized "to demand and receive such sum or sums of money for the transportation of persons and property and for the storage of property, as it deems reasonable," or though it is authorized to "carry freight and passengers charging reasonable terms" or though by its charter it is authorized to charge a certain fixed rate, which is declared by its charter to be irreducible by the legislature, and though no right to appeal, alter or amend the charter is reserved to the legislature in the act granting such charter, still the legislature has a right subsequently to establish by a general act a maximum rate of charges for the transportation of passengers and freight, and to make it applicable to railroad companies, who were, when the act was passed, operating their railroads under such previously granted charters. (p. 342.)

5. Irrevocable grants of franchises to corporations, which impair the supreme authority of the State to make laws for the right government of the State, must be regarded as mere licenses and not as contracts, which bind future legislatures; for no legislature can give away or sell the discretion of subsequent legislatures in respect to matters, the government of which from the very nature of things must vary in varying circumstances. (p. 342.)

6. The right to regulate and fix at their pleasure the charges of railroad companies for transportation of freight and passengers is one of the powers of the State inherent in every sovereignty, to be exercised by the legislature from time to time at its pleasure, and therefore any legislature cannot by a charter granted to a railroad company, though it be for a valuable consideration, confer on such railroad company a right to charge

certain fixed rates for the transportation of freight and passengers, and stipulate that this rate of charge shall not be changed by future legislatures. If that be done, it will not be regarded as a contract but in legal effect as nothing more than a license to enjoy this privilege conferred on the corporation for the time subject to future legislative or constitutional control. (p. 364.)

7. If in a special act of the legislature of this State chartering a company and conferring on it specified privileges exceeding those granted to other like corporations by the general law of the State there be reserved a right to amend this act by a future legislature, and the legislature subsequently passes a general act applicable to all corporations of this character, whereby the specified privilege, while not withdrawn, is so modified as to render it far less valuable to the corporation, which had been chartered by this special act, this cannot be regarded as an exercise by the legislature of the reserved right to amend an act, as it cannot properly be called an amendment of this special act; for by our Constitution, Article 6, Section 30, it is provided, that "no law shall be amended by reference to its title only; but the section amended shall be inserted at large in the new act." But such general act is not necessarily inoperative on such corporation, as it may or may not be subjected to such law; this depending upon whether the legislature has the constitutional power so to control the corporation in this respect. (p. 371.)

8. Chapter 227 of the Acts of 1872-3, passed December 27, 1873, entitled "an act to establish a reasonable maximum rate of charges for the transportation of passengers and freight, and to prevent unjust discrimination and extortion in the rates to be charged by different railroads in this State for the transportation of passengers and freight on said railroads" is applicable to all railroads in this State, whether their charters were

granted before or since the passage of this act; and it is binding on all railroad companies doing business in this State *without regard to any provisions, which may have been inserted in their charters.* The legislature had a constitutional right to pass this act; and no previous legislature had a right to so restrain or limit this legislature as to take from it the right to fix the maximum rates of charges of all railroads in the State, as it pleased. And any provisions in the charter of a railroad company purporting to restrain the legislature in this respect cannot be regarded as a contract, but must be regarded as a mere license revocable at the pleasure of the legislature. (p. 373.)

Judge Dillon, in Section 97, Municipal Corporations, 4th Ed., lays down the rule:

"Powers are conferred upon municipal corporations for public purposes and as their legislative powers cannot, as we have just seen, been delegated, so they cannot without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power as a party to make contracts or pass by-laws which shall cede away, control or embarrass their legislative governmental powers, or which shall disable them from performing their public duties.

In Milhau vs. Sharp, 27 N. Y., 611, it was held that the corporation authorities of the City of New York had no power to confer upon individuals by contract for an indefinite period a franchise for constructing and operating a railroad in the public streets. Judge Selden said:

"If that resolution should be sustained no power would remain in the corporation to remove the railway after its construction if it should prove to be a nuisance, *or reduce the rate of fare*, if it should be found unreasonably high or to compel the introduction of any improved conveyance, if at any future time such methods should be invented, without the consent of

the defendants or their successors, and the powers of the corporation over the streets in many other respects would be abridged. These powers were given to the corporation as a trust to be held and exercised for the benefit of the public from time to time as occasion might require, and they could neither be delegated to others, nor effectually abridged by any act of the corporation authorities."

Citing People vs. Kerr, 27 N. Y., 788; Presbyterian Church vs. Mayor, 5 Cowan, 538; Coates vs. Mayor, 7 Cowan, 585; Gossler vs. Corporation of Georgetown, 6 Wheat., 593. * * * The resolution is forever void for the reason that it purports to create the franchise which the Common Council had no power to create."

In Goszler vs. Corporation of Georgetown, 6 Wheat., 593, the corporation of Georgetown was granted full power and authority to make such by-laws and ordinances for the gradation and leveling of the streets as they may deem necessary for the benefit thereof. In pursuance of this authority an ordinance was passed providing for the leveling and gradation of certain streets, and that when made shall be forever thereafter considered as the true gradation of the streets and to be binding on the corporation and all other persons. Subsequently another ordinance changed the grade of a certain street, and the property owners sought to enjoin the cutting down of the street.

The court held that the power given was a continued power, and that the corporation might, from time to time, alter the gradation so made; Mr. Chief Justice Marshall saying: "We rather think that the legislature cannot abridge its own legislative power."

Richmond Gas Light Co. vs. Town of Richmond, 59 N. Y., 238, the legislature conferred power on the town of Middletown to be caused to be lighted with gas any and all streets of

the town whenever they deemed the same necessary. Under this authority the town entered into a contract which, amongst other things provided for the furnishing of gas by the plaintiff for the lighting of certain streets for the term of five years. The inquiry was whether the contract was valid for the five years. The Court said:

"The defendant was a municipal corporation created by law for certain governmental purposes, authorized to exercise such powers only as were conferred upon it by law. Prior to the passage of the act of 1865, it had no power to cause any of the streets of the town to be lighted with gas, or in any other way. By that act such power was conferred upon the defendant. For what term? If the board of town auditors could deprive the legislature of this power for five years, by entering into a contract with the plaintiff for that time, it might for one hundred years, by contracting for that period. I think it entirely clear that no such power was conferred by the act upon the town auditors."

In People's Railway Co. vs. Memphis Railway Co., 10 Wall., 38 (844). Mr. Justice Clifford held that municipal authorities of a city cannot grant to an association the power to construct and maintain for a term of years, a railroad in one of the streets of a municipality for the transportation of passengers for private gain, saying: "Special powers are given to such corporations to lay out, open and repair streets as a trust to be held and exercised for the benefit of the public from time to time, as occasion may require; and the general rule is that those powers cannot be delegated to others, nor be effectually abridged by any act of the municipal corporation without the express authority of the legislature."

See also numerous authorities cited by Judge Dillon in note to Section 97.

In Gale vs. The Village of Kalamazoo, 23 Mich., 344. Gale brought suit against the village of Kalamazoo for the breach of

a contract in refusing to exercise the legislative powers of the village to carry out an agreement. Gale and the village had entered into a written contract, in and by which Gale obligated himself to erect on certain lands in Kalamazoo a market house, and agreed upon the completion of the same to place it in the care and under the control of the village authorities for the term of ten years, the village agreeing to control and rent the stalls from year to year for such sums of money and to such persons as might be agreed upon between Gale and the President and Trustees of the Village, the rent to be paid to Gale as the same was received from the occupants of the stalls. Gale was to keep the market house in good repair at his own cost during the continuance of the contract.

In consideration of Gale's agreement, the village bound and obligated itself to have the market house attended to and supervised by a competent manager, and it further agreed that during a continuance of the contract there should be no other public market house in the village, provided Gale's market house proved large enough to accommodate the public. Mr. Justice Cooley delivered the opinion of the Court, and amongst other things he said: "If a municipal corporation can preclude itself in this manner from establishing markets wherever they may be thought desirable, or from abolishing them when found undesirable, it must have the right also to agree that it will not open streets, or grade or pave such as are opened, or introduce water for the supply of the citizens, except from some specified source, or buy fire engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description.

"Individual citizens, looking only to the furtherance of their private interests, might, in various directions, engage it in permanent contracts, which, while ostensibly for the public benefit, should impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For, if the village might bind itself to one market house, for ten years, it might do so for all time to come; and if it might agree that conveniences and improvements of one class might be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or unscrupulous proprietor of town lots, that all improvements of every description should be so located or made as to conduce to his benefit, irrespective of the general good.

It will not do to say of such a contract that it must be assumed to have been reasonable in view of the actual condition and wants of the village, and of its probable growth and future needs. What would be thought proper for the village this year, might be found worse than useless the next, and no official prescience could determine with absolute or even tolerable certainty what changes a few years might work. Indeed, it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. These powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government with restrictions for the protection of individuals or municipal rights could long exist without recognition.

But there is at least one feature of the contract which would invalidate it, even if we were to be confined to a consideration of existing facts, and were at liberty to assume that the circumstances bearing on its reasonableness would continue unchanged for the whole period of ten years. Not only was the marketing to be confined to one locality, but the plaintiff was to have an unlimited right to control the occupation of the market house through the power given him to determine the rents to be paid by lessees. This vested in him a practical monopoly of the public market; and though it is possible that he might exercise his rights impartially as between dealers, and with an eye to the public good, we cannot lose sight of the fact so well stated in the old case of monopolies, that "the end of all these monopolies is for the private gain" of those who hold them.—Darcy vs. Allen, 11 Rep., 84; Broom Const. L., 738. They are founded in destruction of trade, and cannot be tolerated for a moment."

In Pontiac vs. Carter, 32 Mich., 164, the same learned justice again said: "A city cannot even by contract itself of any of its legislative powers, which was conferred upon it to be exercised again and again as long and as often as occasion shall require."

In the matter of opening First Street, 66 Mich., 42, the City Council had agreed with the Grand Rapids & Ind. R. R., that in consideration of the construction and maintenance of a passenger house between Bridge and First street, that First street should not be continued across the line of said railroad. The city afterwards sought to open the street, and the railroad company contended that it was in violation of its contract. The Court said: "The laying out and opening of streets by the Common Council of a city is the exercise of its legislative functions, and any contract made by a city with an individual or corporation, by which it agrees that it will not in the future open or extend a street in any particular place or part of the city, is an abnegation of its legislative powers, unauthorized by its char-

ter, and may be alike be destructive of the convenience and prosperity of the municipality. The claimed contract in this case is of this character, and void, and furnishes no basis for any liability of any kind on the part of the city to the defendant in this case. (Citing authorities.) * * * The powers of a municipal corporation in respect to improving and controlling its streets are held in trust for the public benefit, and cannot be surrendered by contract to private persons, or to a corporation, by resolution of the Common Council, or in any other manner. If this could be done there is no reason why the Common Council of any year may not, by contract, preclude the city for all future time from opening, widening or extending any of its streets, or laying new streets, no matter how great the public necessity may be therefor. * * *

Petz vs. City of Detroit, 95 Mich., 169, was a bill by Petz to restrain the City of Detroit from interfering with the complainant's occupancy in the Central Market. By ordinance it was made the duty of the controller in each year to lease the stalls and stands which might be applied for, for a term of one year. In 1885 the complainants entered into written leases with the City of Detroit, as provided for in the ordinance; but thereafter no lease was made, the complainants however continuing to occupy, and claiming thereby to be tenants from year to year. The Court said: "The authority to establish and regulate markets falls within the Police Power of the states, and the right to exercise such authority may be conferred upon municipal corporations. The Police Power cannot be abridged, granted or bargained away, or impaired by contract. Complainants' tenancy, whether from year to year or from month to month, was subject to the exercise by the Common Council of the power of removal vested in that body."

Common Council cannot delegate its powers to R. R. Co.

In Mayor of Knoxville vs. Africa, 77 Fed. Rep., 501, a decision of the Court of Appeals of the Sixth Circuit in constru-

ing an ordinance of the City of Knoxville, which in all respects is similar to the ordinance of November 24th, 1862, involved here, in respect to the claim asserted that the ordinance conferred upon the grantees named therein the exclusive right to the use of all streets in the City of Knoxville for the purpose of operating a street railroad irrespective of whether such streets were specifically designated in the ordinance or not. Judge Lurton said:

"The clear purpose of this ordinance was to enable the grantee to elect from time to time what streets it would occupy, and what new lines, or extensions of old ones, its interests as a private corporation would justify. To delegate this power to a street railroad company is wholly inadmissable, violates every principle of public policy, and has no sanction in law. The provision of the statute, providing that "no one of the streets of said city shall be used by said company * * * until the consent of the city authorities has been first obtained and an ordinance shall have been passed prescribing the terms on which the same may be done," is a clear implication that the city authorities shall know what streets the proposed railroad is to occupy, and intelligently determine whether the public interests will thereby be subserved."

And in holding that this power of designation of the streets in the Common Council of the city and could not be delegated to the railroad company, he cites the case of State of New Jersey vs. Mayor, 30 Atl., 531, where a city ordinance empowered a street railroad company to construct any and all necessary curves, sidings, crossovers, and switches that may be required for the proper, safe, and economical operation of the railway," was held void as delegating a discretion to the railroad company which the municipal government was itself bound to exercise.

And also Railway Co. vs. Jones, 34 Fed., 579, by Judge Caldwell, where a grant to a street railway company to occupy certain named streets, "and all other streets, within the present and

future corporate limits of the City of Pine Bluff, as the parties of the second part think the public necessities require," which ordinance was held invalid, the court holding that "The power and duty of determining when and on what streets the public conveniences requires street railroads is devolved by law on the City Council, and that body cannot refuse to discharge this duty, or devolve it on a street car company, whose action would be controlled by its own, rather than the public interest."

The principle of the above cases applies in the case at bar to the contention of complainant's counsel that the street railroad company, by the ordinance under consideration, have been given the power and authority to fix and determine any rate the street railway company may determine upon, not considering the maximum rate fixed in the ordinance. This is an attempt at delegation by the Common Council of Detroit to the railroad company of fixing and determining a rate within the limit without respect to the reasonableness of such rate, but solely with a view of meeting the supposed requirements, necessities or greed of the railway company.

In Wabash Railroad Co. vs. Defiance, 167 U. S., 88, this Court affirmed the ruling of the Supreme Court of Connecticut, saying that:

"The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted nor the use of property, be withdrawn from the implied liability to government regulation in particulars essential to the preservation of the community from injury." Citing cases.

"While municipalities, when authorized so to do, doubtless have the power to make certain contracts with respect to the use of their streets, which are obligatory upon them," citing cases; "the general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such a manner as to disable them from the performance of their public functions. These bodies

exercise only such powers as are delegated to them by the sovereign legislative body of the state. Such powers, however, are personal to the municipalities themselves, and being conferred for the benefit of the whole people, in the absence of authority to that effect, cannot be bestowed by contract or otherwise upon individuals or corporations in such a manner as to be beyond revocation."

V.

THE REGULATION OF FARES IN THE ORDINANCES IN QUESTION MAY BE SUPPORTED BY THE RESERVE POWER OF ALTERATION, AMENDMENT OR REPEAL, CONTAINED IN THE CONSTITUTION AND STATUTES OF MICHIGAN.

The Constitution of the State of Michigan, Art. 15, Sec. 1, provides:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

My contention is that the regulation of the rates of fare or toll upon the street railway is a governmental function, delegated by the legislature of the State of Michigan to the municipalities, and no matter in what form such delegation or power may be exercised, whether by ordinance or an assumed contract, it is nevertheless a law, subject to alteration, amendment or repeal. It has not been the policy of the State of Michigan since the adoption of the present Constitution to permit irrevocable legislation. The State cannot do it itself, and if it cannot, surely one of its creatures, like a city, cannot be permitted to do that which its creator is prohibited from doing.

Few, if any, charters are now granted to corporations either by special grant or under general laws without a reservation of the right to amend or repeal them.

As was said by Mr. Justice Miller in Greenwood vs. Union Freight Railroad Company, 105 U. S., 13 (961):

"As early as 1806, in the case of Wales vs. Stetson, 2 Mass., 146, the Supreme Court of that State made the declaration, 'That the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.' In the case of Dartmouth College vs. Woodward, 4 Wheaton, 518, decided in 1819, this court announced principles on the subject that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in Fletcher vs. Peck, 6 Cranch, 87, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon *private as distinguished from public corporations* by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration or repeal, except by consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State Legislatures could retain in a large measure

this important power, without violating the provisions of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligations. And he cites with approval the observations we have already quoted from the case of Stetson vs. Wales, 2 Mass., 146.

It would seem that the states were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal, a case from McLaren vs. Pennington, 1 Paige, 102, in which the Legislature of New Jersey, when chartering a bank with a capital of $400,000 in 1824, declared by its 17th section that it should be lawful for the legislature at any time to alter, amend and repeal the same. And Kent, 2nd Com., 307, speaking of what is proper in such a clause, cites as an example a charter by the New York Legislature, of the date of February 25th, 1822. How long the Legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831, it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration and repeal at the pleasure of the legislature, and such has been the law ever since.

The history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal."

The evident purpose of the reservation, in view of its history, was to eliminate as far as possible the elements of an inviolable contract from grants and franchises; but as the doctrine whose

results it aims to prevent has been criticised, and its scope and bearing were not at first appreciated, the reasoning upon the reserved power is likewise often obscure.

"The right to repeal or alter a charter may be reserved by the operation of a constitutional provision or statute, the general application in force at the time the corporation is created.

In Pennsylvania College Cases, 13 Wall., 213 (550), Jefferson College was incorporated in 1802; Washington College in 1806, and was located seven miles distant from Jefferson College in the same county. Experience showed, in the progress of events, that the interests of both institutions would be promoted in their union, and the Legislature of Pennsylvania, in 1865, passed an act to unite the two colleges and to erect the same into one corporation under the name of Washington and Jefferson College. Certain interested parties were dissatisfied with the new arrangement and several bills in equity were filed looking to the undoing of the legislature of 1865. The only question considered in the case was whether the act of 1865 impairs the obligation of the contract between the state and corporation of Jefferson College, as created by the original charter. In other words, whether it is repugnant to the 10th section of the Federal Constitution. By that charter it was declared that the trustees should be a body politic, to a perpetual succession, and that the constitution of the college "shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an act of the legislature of the commonwealth."

Mr. Justice Clifford, delivering the opinion of the Court, said:

"Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, as the grant under such circumstances becomes a contract within the protection of that clause of the Constitution which ordains that no State shall pass any law impairing the ob

ligations of contracts. Dartmouth Coll. vs. Woodward, 4 Wheat., 700. Charters of private corporations are regarded as executed contracts between the government and the corporators, and the rule is well settled that the legislature cannot repeal, impair or alter such a charter against the consent or without the default of the corporation judicially ascertained or declared. Fletcher vs. Peck, 6 Cranch, 136; Terrett vs. Taylor, 9 Cranch, 51. Of course these remarks apply only to acts of incorporation which do not contain any reservations or provisions annexing conditions to the charter modifying and limiting the nature of the contract. Cases often arise where the legislature, in granting an act of incorporation for a private purpose, either make the duration of the charter conditional, or reserve to the state the power to alter, modify or repeal the same at pleasure. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution. Such a power also, that is, the power to alter, modify or repeal an act of incorporation, is frequently reserved to the State by a general law applicable to all Acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the Act of incorporation is one which falls within the reservation and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition nor any allusion to such a reservation. Dartmouth Coll. v. Woodward, 4 Wheat., 708; Gen. Hosp. v. Ins. Co., 4 Gray, 227; Suydam v. Moore, 8 Barb., 358; Ang. & Ames, Corp. (10th Ed.), Sec. 767, p. 787. Reservations in such a charter, it is admitted, may be made, and it is also conceded that where they exist the exercise of the power reserved by a subsequent legislature does not impair the obligations of the contract created by the original act of incorporation. Subsequent

legislation altering or modifying the provisions of such a charter, where there is no such reservations, is certainly unauthorized if it is prejudicial to the rights of the corporators, and was passed without their assent, but the converse of the proposition is also true, that if the new provisions altering and modifying the charter were passed with the assent of the corporation and they were duly accepted by a corporate vote as amendments to the original charter, they cannot be regarded as impairing the obligation of the contract created by the original charter. Mumma vs. Potomac Co., 8 Pet., 286; Dartmouth Coll. vs. Woodward, 4 Wheat., 712; Slee vs. Bloom, 19 Johns, 474; Riddle vs. Locks, 7 Mass., 185; McLaren vs. Pennington, 1 Paige Ch., 107; Lincoln & Ken. Bk. vs. Richardson, 1 Me., 79; Monongahela Nav. Co. vs. Coon, 6 Pa. St., 379; Com. vs. Cullen, 13 Pa. St., 133; Sprague vs. Ill. Riv. R. R. Co., 19 Ill., 174; Joy vs. Jackson Co., 11 Mich., 155.

Private charters, or such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the State which was in operation at the time the charter was granted. Cool. Cons. Lim., 279; Binghamton Bridge Case, 3 Wall., 51 (70 U. S., 181; Piqua Bank vs. Knoop, 16 How., 369; Vincennes Univ. vs. Indiana, 14 How., 268; Panter's Bk. vs. Sharp, 6 How., 301."

In Stone vs. Wisconsin, 94 U. S., 181 (102), the plaintiff in error was arrested and tried in the court below for alleged violation of a statute of the State in receiving more than the statutory rate of fare from a railroad passenger. The territory of

Wisconsin had granted a charter to a railroad company which was not accepted at the time the State was admitted into the Union. The charter provided that on the completion of said railroad it shall and may be lawful for the company to demand and receive such sum or sums of money for passengers and freight of persons and property as they shall, from time to time, think reasonable, and it was claimed that this gave the company the contract right to fix its own rates of fare and freight, subject only to a judicial determination as to whether they were reasonable.

The Constitution of Wisconsin provides that all laws for the creation of corporations may be altered or repealed by the Legislature at any time after its passage. Several months after the State was admitted the company accepted its charter. The Court held that the State Constitution having continued the act incorporating the company in force, it became thereafter a State statute for the incorporation of the company, and as such, subject to the reserve power of alteration and repeal.

In Atlantic & Gulf R'y Co. vs. State of Georgia, 98 U. S., 359 (1851), by the statutory Code of Georgia which came in force January 1, 1863, it was enacted that private corporations were subject to be changed, modified or destroyed at the will of the creator, except so far as the law forbids it; and in all cases of private charters thereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter. Two railroad corporations created prior to 1863, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an Act of the Legislature passed on the 18th of April, 1863, which authorized a consolidation of their stocks, conferred upon the consolidated companies full corporate powers, and continued to it the franchises, privileges and immunities which the companies had held by their original charters. The Court held, first, That,

by the consolidation a new corporation was created and the original companies were dissolved.

2. That the new corporation became subject to the provision of the Code which reserved the right to the Legislature to withdraw its charter or to change, modify or destroy it.

3. That a subsequent legislative act, taxing the property of the corporation as other property in the State is taxed, was not prohibited by the provision of the Constitution of the United States which denies to a State the power of passing a law impairing the obligation of a contract.

Spring Valley Water Works vs. Schottler, 110 U. S., 347 (1733). Article 4, Sec. 31, of the Constitution of the State of California, adopted in 1849, is as follows:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

In 1853 the Legislature passed an act providing for the formation of corporations for certain purposes, including corporations for the purpose of supplying cities, counties and towns with water. Under this act it was provided that such corporations should furnish such cities, etc., water for family use, at reasonable rates and without distinction of persons, and should furnish water for fire and other great necessities free of charge; that the rates to be charged for water should be determined by a board of commissioners, two selected by such city, two by the water company, and in case the four could not agree, they should chose a fifth person and a decision of the majority should determine the rates charged for one year and until new rates should be established. In 1878 the commission fixed a tariff of rates to go into effect on the first of January, 1878. In 1879 California adopted a new constitution which went into effect January 1, 1880. This new Constitution provided that the rates for the use of water should be fixed annually by the board

of supervisors. Under this provision the supervisors claimed the right and power to fix the rates to be charged by the Spring Valley Water Works for the use of water. The question involved in the case was whether water power companies in California formed before the adoption of the Constitution in 1879 have a right which the State is prohibited by the Constitution of the United States from impairing or taking away, to charge their customers such prices for water as may, from time to time, be fixed by a commission.

Mr. Chief Justice Waite said:

"The reservation of power to alter or repeal the charters of corporations was not new, for almost immediately after the judgment of this Court in the Dartmouth College Case, 4 Wheat., 518, the states, many of them, in granting charters acted on the suggestion of Mr. Justice Story in his concurring opinion, and inserted provisions by which such authority was expressly retained. * * * In California, the Constitution put this reservation into every charter and consequently this company was from the moment of its creation subject to the legislative power of alteration and, if deemed expedient, of absolute extinguishment as a corporate body. * * *

"The power to amend corporate charters is no doubt one that bad men may abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with authority to make them. * * * The provision for fixing rates cannot be separated from the remainder of the statute by calling it a contract. It was a condition attached to the franchises conferred on any corporation formed under the statute and indissolubly connected with the reserved power of alteration and repeal."

In Chesapeake & Ohio Railway Co. vs. Miller, 114 U. S., 176 (1121), the statutes of West Virginia exempted from taxation certain railroad companies which afterwards were consolidated

into the Chesapeake & Ohio, and it was held that such exemption was personal to the original corporation and did not pass to their successor; but the Court said:

"Were it otherwise, and if they were constrained to hold that the new corporation took all the rights and privileges of the old, still, all grants of corporate rights, powers, privileges, franchises and immunities are taken subject to existing laws, remaining unrepealed. At the time the plaintiff in error became a corporation the statute of West Virginia was in force and has never been repealed. It enacted amongst other things as follows:

"And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company. * * * The rights of the plaintiff in error, as a corporation, are determined by the law in force when it came into being, although there is no ground on which it can be contended that there was any legislative contract in the Act of March 1, 1866.

In Tomlinson vs. Jessup, 82 U. S., 454 (204), there was a bill filed for an injunction against the collection of a tax. The question presented was whether an act passed to amend the charter of the Northeastern Railroad Company exempted the property of that company from such taxation. The company was incorporated in 1851, and at that time a general law of the State was in existence which enacted that the charter of every corporation subsequently granted should be subject to amendment, alteration or repeal by legislative authority, unless the act granting the charter or the renewal, amendment or modification, in express terms excepted it from the operation of that law. The Court said:

"The provisions of that law constituted the condition upon which every charter of a corporation subsequently granted was

held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them.

It is true that the charter of the company when accepted by the corporators constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841, authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interest with knowledge of the existence of this power, and the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation."

Miller vs. People of the State of New York, 82 U. S., 478 (15 Wall., 98), was a suit in the nature of a quo warranto to try the title of the plaintiffs in error to the office of directors of the Rochestor and Genesee Valley River R. R. Co.

It was held that the power to alter, modify or repeal an act of incorporation, may be reserved to the State by a general law applicable to all acts of incorporation, in which case the power may be exercised whenever the charter was granted subse-

quently to the passage of the general law. Where such a provision is incorporated in the charter, it qualifies the grant, and the subsequent exercise of that reserved power is not an act within the prohibition of the Constitution. The reservation is equally valid and effectual if it exists in the Constitution of the State, or in a prior general law.

These principles were applied to an amendatory act authorizing a city to elect seven directors of a railroad company instead of four, as theretofore provided.

In Close vs. Greenwood Cemetery, 107 U. S., 466 (408), the Court said: "A power reserved to the legislature to alter, amend or repeal a charter, authorizes it to make any alteration or amendment of the charter granted subject to it which will not defeat or substantially impair the object of the grant of any rights vested under it which the legislature may deem necessary to secure either that object or any public rights."

In the Commissioners of Inland Fisheries vs. Water Power Co., 104 Mass., 446, in the exercise of such power by the United States, it was observed by the Chief Justice in delivering the opinion of the Court in the Sinking Fund Cases: "It is not only their right, but their duty, as sovereigns to see to it that the current stockholders do not in the administration of the affairs of the corporation appropriate to their own use that which in equity belongs to others." 99 U. S., 700 (496).

Sioux City St. Ry. Co. vs. City of Sioux City, 138 U. S., 98 (898). The Sioux City St. Railway Co. became a corporation on December 6, 1883, under a general act of the corporation laws of Iowa. On the 12th of December, 1883, the City of Sioux City by an ordinance conferred upon the company the right to locate, operate, construct and maintain street railways upon and along certain streets of the city, on the terms and conditions specified in such ordinance. Section 11 of the ordinance was as follows: "Whenever by resolution of the Common Council any street or part of street on which said track shall be

laid and operated shall be ordered paved or macadamized, either at the expense of the city or of the owners of abutting property, then the said proprietors of said railway shall pave or macadamize in the time and manner directed the space *between* the rails, and shall thereafter keep the space *between* the rails in good repair; and shall keep in good condition and repair the space between the tracks on all bridges that they may cross." The company accepted the ordinances. March 15th, 1884, the legislature of Iowa passed an act entitled, "An Act granting additional powers to certain cities of the first class with reference to the improvements of streets," etc. The sixth section of the act provided as follows: "All railway companies and street railway companies in cities of the first class as provided in Section 1 of this act, shall be required to pave or repave between the rails, *and one foot outside of their rails*, at their own expense and cost;" and providing further, that whenever any street should be ordered paved or repaved, that the space between the outside of their rails should be done at the same time, and of the same material. On the 11th of May, 1886, the City Council passed an ordinance providing therein that "whenever the City Council shall cause to be paved any street whereon any railway has or shall be located and laid down, they shall also order and provide by resolution that the company or persons owning the said street railway pave said street between the rails of said railway or street railway, and one foot each side the rails, at their own expense and cost; Provided, That the provisions in this section shall not in any manner be construed to affect any right accrued or existing in favor of said railway companies or street railway company under any franchise or license heretofore granted under any ordinance heretofore adopted by said City Council." Under this and subsequent ordinances the City Council ordered certain streets to be paved, and provided for assessing to the street railway company the cost of paving the space between the rails and one foot outside thereof. The company objected

to this assessment, alleging that it was expressly provided that the company should only be required to pave so much of the streets wherein the track was constructed as should be *between the rails of said track*. The Court said that under Section 1090 of the Iowa Code the legislature had the power not only to repeal and amend the articles of incorporation of the company, but could impose any condition upon the enjoyment of its franchise which the General Assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The City Council could make no arrangement with the company which would not be subject under that section to the superior power of the General Assembly. "Moreover, the city derived from the State alone its power to grant a license to the company. The right to operate the railway in the streets is a franchise obtained through power given to the city by the State, but the State reserved the power to regulate such franchise and impose conditions on it. It reserved the power to determine the question of the exemption of the company from taxation, and to describe what burdens should be imposed upon it for the public good in the enjoyment of its franchise. Manifestly, such power of the State would exist, if the right to occupy the streets with tracks were granted to the company directly by an act of the legislature of the State; and the case is not changed by the fact that the franchise was granted by the city. There is nothing in the ordinance of the City Council which takes away the power of the State and the city to impose additional taxes on the property of the company, or which indicates an intent that no further or different tax should subsequently be imposed on its property. Delaware R. R. Tax Case, 85 U. S., 18 Wall., 200, 207 (21: 888, 895); Union Pass. R. Co. vs. Philadelphia, 101 U. S., 528, 536 (25: 912, 913); Com. vs. Easton Bank, 10 Pa., 451.

No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate

powers subject to the reserved power of the State to modify its charter and to impose additional burdens upon the enjoyment of its franchise. Under the act of March 15th, 1884, it was made a condition of the enjoyment of its franchise by the company, that when the city should determine that the streets should be paved, the company should bear a certain portion of the cost thereof; and any prior contract between the company and the city in regard to paving was subject to the provisions of Section 1090 of the Code. There was nothing in the ordinance of December 12th, 1883, which bound or could bind the city not to exercise its statutory authority to impose other conditions upon the exercise of the rights of the company.

Our conclusion, therefore, is that there was no contract between the company and the State or the city, the obligation of which was impaired by the laying of the tax in question."

In Gibbes vs. Consolidated Gas Co. of Baltimore, 130 U. S., 396 (979); after the incorporation of the two gas companies in the City of Baltimore, the Legislature of Maryland in 1882 passed an act among other things prohibiting the gas company from entering into any consolidation, combination, or contract with any other gas company whatever. Notwithstanding this provision, the two gas companies sought to consolidate; and the Court held such attempted consolidation illegal, basing its opinion upon the general power reserved to alter, amend or repeal, and saying, that the consent of the corporation was not required to the operation of such a provision as that embodied in the act of 1882.

The same doctrine is fully discussed by the Court in U. S. vs. U. P. R. R. Co., and Western Union Tel. Co., 160 U. S., page 1 (331); and the authorities upon the subject are there collated

Louisville Water Co. vs. Park, 143 U. S., 1 (55). In this case it is held, that where the law of the State exempts a corporation from taxation, and there is a previous law that the legisla-

e may alter or amend charters and laws, a subsequent statute,
ing the property of the corporation subject to taxation does
t impair the obligation of any contract which it had with the
ate by the law giving the exemption. The Water Company
s granted an exemption from taxation, and this exemption
s subsequently withdrawn; and the Court held that it was
mpetent for the legislature to withdraw such exemption. The
urt say: "By the reservation in the law of 1831, which is to
considered embodied in that act, the State retained the power
ter it in all particulars constituting the grant to the new
mpany formed under it of corporate rights, privileges and
munities. The existence of the corporation and its franchise
f immunities. The existence of the corporation and its fran-
se and immunities derived directly from the State were thus
t under its control."

Grand Rapids E. L. & P. Co. vs. Grand Rapids E. E. L. &
G Co., 33 Fed., 659. The City of Grand Rapids in 1880
ed an ordinance giving the Grand Rapids Electric Light &
wer Co authority to use *exclusively* for the term of fifteen
rs from the passage of this ordinance any or all streets, lanes,
es, etc., in the city; and expressly agreed therein, that "The
clusive rights and privileges hereby granted shall not be im-
ired or abridged by alteration or amendment." This ordin-
ce was duly accepted, and the company thereafter proceeded
onsiderable expense to locate works and to extend its works
order to supply the city with electric light. May 20th, 1887,
City of Grand Rapids passed an ordinance granting to the
fendant, the Grand Rapids Edison Electric Light & Fuel
Co., the right to use the streets of said city for the purpose
erecting supports, running wires on or cables, etc., in the dis-
bution of electric lights throughout the city. The defendant
epted this ordinance, which contained the same general pro-
ions as the ordinance of April 19th, 1880, except that it con-
red no exclusive rights or privileges; and was proceeding

with the erection of its wires when the complainant filed a bill in equity in the Circuit Court of the United States, claiming that its acceptance of the ordinance of April 19th, 1880, constituted a contract with the City of Grand Rapids which conferred upon it the exclusive right to use the streets for the purposes enumerated in said ordinance. Judge Jackson heard this case, and in the course of a very elaborate opinion he said at page 672: "Looking at the question of the legislative intent, from another standpoint, we find that it is not the policy of the State of Michigan to grant irrepealable franchises and privileges to private corporations. Articles 15, Section 1, of the State Constitution, provides that 'Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. *All laws passed pursuant to this section may be amended, altered or repealed.*' Now, by the ordinance of 1880, if valid, the complainant, a corporation organized under the laws of the State, has secured not only the exclusive franchise belonging to the State, but an *irrepealable privilege*, such as the legislature could not have conferred. Is it to be presumed that the legislature under its constitutional authority '*to confer upon incorporated cities such powers of a local, legislative and administrative character as they may deem proper*,' intended to invest the Common Council of Grand Rapids with the power to grant irrepealable franchises in or over the streets of that city, and thereby confer upon the grantee privileges or franchises not subject to alteration, amendment or repeal—rights which the legislature could not itself have directly conferred? If such a presumption is proper, the conclusion is reached, that the agencies or creatures of the State may in the exercise of derivative and delegated power do what the legislature could not. This would violate the well settled rule, that the legislature cannot do indirectly through the local government what the people by their constitution have restricted it in doing directly." Dillon Mun. Corp., 2nd Ed., Sec. 262.

In Section 317, Dillon's Municipal Corporations, 4th Ed.: "Since all the powers of the corporation are derived from the law and its charter, it is evident that no ordinance or by-law of the corporation can enlarge, diminish or vary its powers."

In the recent case of Attorney General vs. Pingree et al., decided July 5th, 1899, 120 Mich., 550, the Supreme Court of Michigan, in discussing the recent Act of the Legislature providing for the appointment of a commission and the purchase of the railway system of the City of Detroit, and having reference to the Michigan constitutional provision, which prohibits the State from engaging in any works of internal improvement —Section 9, Article 14, said: "To say the system of railroads as it existed in 1850 constituted internal improvements within the meaning of the Constitution, and that the system of roads existing in Detroit which are to be taken over by the commission, and the lines leading thereto, with which said commission is allowed to make agreements for deeds and leases and in relation to the exchange of tickets and transfers, is not a system of internal improvements within the meaning of the Constitution, is to deny the words in common use their ordinary and accepted meaning. If the legislature may authorize the City of Detroit to enter into the proposed arrangement, it may authorize any other municipality to do so, and by concerted action between the various municipalities they may cover the State with means of rapid transit owned and operated by the municipality. This would enable the State to do by means of agencies called into being by itself what it cannot itself do, or what the Constitution forbids it to do."

Again, at page 565 the Court said, quoting from Anderson vs. Hill, 54 Mich., 477: "If the legislature has the authority to pass a law permitting the majority of the legal voters of a particular township to impose a tax to aid the State in a work of internal improvement, it has the authority to impose such by direct enactment without the intermediate step of a vote of the

people, and against their wish; and the rule is well settled, if it has not the power to impose such tax directly, it cannot authorize the imposition of the tax indirectly through a vote of the municipality or people."

It will be borne in mind, that the ostensible object and purpose of the McLeod Act, and the appointment of a street railway commission to purchase the Detroit system of railways, was solely to obtain a reduction of the rates of fare. And bearing this in mind, the language of the Court on page 249 is significant: "The City is already well supplied with means of transit, and if abuses exist in the management, the authorities have ample power to correct it."

In City of Indianapolis vs. Navin, decided in 1898, 41 L. R. A., 337, the defendant was complained of for the violation of an ordinance of the City of Indianapolis which provided that "no one shall ride on a car without paying fare of not in excess of five cents." The action was brought to collect the penalty provided for the violation of the ordinance in refusing to pay the rate of five cents prescribed by the city ordinance for riding upon the cars of the Citizens' Street Railway Company. The appellee filed an answer, admitting the passage of the ordinance, and its validity, and that he had ridden as alleged and had refused to pay the five cents demanded, but justified such refusal on the Act of the Legislature approved March 6, 1897, which act provided, that any cities in the State having a population of one hundred thousand or over, according to the United States Census of 1890, the cash fare shall not exceed three cents for any one trip or passage on a street railroad or road. It was insisted by the Street Railway Co. that the Act of 1897 was unconstitutional, because it impairs the obligation of a contract. The Court said: "Counsel for appellant do not point out any contract or obligation which is impaired by said Act. If it is the contract under which the Street Railway Company took possession of the streets of Indianapolis and constructed its

tracks, it is sufficient to say that the City was not authorized to enter into any contract which would prevent the Legislature from legislating upon the subject of fares. It is settled, that the Legislature has the power to *reasonably regulate* the rates of fare for transportation of passengers within the State on street railways. (Citing authorities.) * * * * The Revised Statutes of 1881 expressly reserves to the Legislature the right to amend, alter or repeal said Act at its discretion. * * * * The right of the Legislature, however, to regulate the fare upon street railroads organized under the Act of 1861, does not depend upon a reservation of the right to amend or repeal the act in Section of the Act. That power would exist even if the right to repeal or amend had not been reserved. In order to exempt a common carrier from legislative control over its rates of fare, it must appear that the exemption was made in its charter by clear and unmistakable language inconsistent with the exercise of such power by the Legislature. Covington & T. Turnp. Road Co. vs. Sandford, 164 U. S., 578; 41 L. ed. 560; Georgia R. & Bkg. Co. vs. Smith, 128 U. S., 174; 32 L. ed., 377; C. B. & Q. R. R. Co. vs. Iowa, 94 U. S., 155; 24 L. ed., 94. Appellant had the power to prescribe the terms upon which, and the time for which, a street railroad company organized under said Act of 1861 should occupy the streets of said city; but such contract, when made, was subject to the right of the Legislature to amend or repeal said act at its discretion, and no contract made by the city with a street railroad company could prevent the exercise of such power by the Legislature. It is clear, therefore, that said Act of 1867 does not impair the obligation of any valid contract of either the State or Appellant."

Section 1, Article 15, Constitution of Michigan, is as follows:

Section 1. Corporations may be formed under general laws, but shall not be created by special act, except for muni-

cipal purposes. All laws passed pursuant to this section may be amended, altered or repealed.

In Detroit Street Railway Co. vs. Guthard, 51 Mich., 180, a question was considered which has an important bearing upon our contention here. It will be remembered that the Detroit Street Railway Company is one of the railway companies to whose rights the complainant here succeeds.

The 22nd section of the Act under which the Detroit Railway was incorporated provides that,

"Each and every railway company formed under this act shall pay to the treasurer of the State of Michigan an annual tax, at the rate of one-half of one per cent. on the whole amount of capital paid in upon the capital stock of said company; which said tax shall be estimated upon the last preceding report of said company, and shall be paid to the said treasurer on the first Monday of July in each year, *and shall be in lieu of all other taxes upon the property of said company.*"

The 31st section of the same act is as follows:

"The Legislature may at any time alter, amend, or repeal this act; but such alteration, amendment, or repeal shall not operate as an alteration or amendment of the corporate rights of companies formed under it, unless specially named in the act so altering or amending this act."

Section 22 remained in force and the companies were taxed under it until 1882, when in the general revision of the tax laws by the adoption of the plan of the Tax Commission it was repealed, and corporations generally, including train raiyway companies, were for the purposes of taxation put upon the same footing with natural persons and made taxable upon an same footing with natural persons, and made taxable upon the assessed valuation of property. There was no repeal of Section 31, and there was no express declaration that the repeal of Section 22 should be applicable to corporations previously formed and specially named.

After the enactment of the general tax law of 1882, the railway company was named on the tax rolls of the city and taxed with other persons. Defendant Guthard was receiver of taxes and was proceeding to make collection when suit was commenced.

The contention of the railway company was that so long as Section 31 remains in force it is not competent to tax the companies formed under this general incorporation act, otherwise than as provided by Section 22.

The Court said:

"This contention does not raise a question of constitutional power. By the Constitution of 1850 all acts of incorporation which should be thereafter passed were expressly made subject to alteration, amendment and repeal; and this act may therefore be changed in the legislative discretion. * * * The question then is whether with Section 31 in force, taxation by any other standard than that provided by Section 22 is competent and admissable. * * *

If to be taxed according to the provisions of Section 22 is one of the corporate rights of these companies within the meaning of Section 31, as plaintiffs contend it is, then they must be taxed under that section while Section 31 remains in force, or they cannot be taxed at all. * * *

Is, then, taxation by the standard and in the mode provided by Section 22 a corporate right of these corporations within the meaning of Section 31? We think not. The rights intended by that section, we think, are the essential and important rights of corporations formed for the particular purposes which the act had in view, as distinguished from the privileges and immunities which are not so fundamental, but which may nevertheless have value. An attempt to enumerate the rights here would be presumptious and without value; but in general terms it may be said that the franchise to construct and operate a road and to levy and collect reasonable *remunerative* tolls or

charges would be corporate rights, while exemption from the customary and uniform operation of the essential powers of government, like the power to tax and the power of police regulation, must be regarded as a privilege rather, or an immunity."

Judge Jackson in Grand Rapids case, 33 Fed. Rep., at 672, said:

"Looking at the question of legislative intent from another standpoint, we find that it is not the policy of the State of Michigan to grant irreapealable franchises and privileges to private corporations. Article 15, Sec. 1, of State Constitution, provides that 'corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed.' Now by the ordinance of 1880, if valid, the complainant, a corporation organized under the laws of the State, has secured not only an exclusive franchise belonging to the State, but an irrepealable privilege, such as the Legislature could not have conferred. Is it to be presumed that the Legislature, under its constitutional authority 'to confer upon incorporated cities such powers of a local legislative and administrative character as they may deem proper,' intended to invest the Common Council of Grand Rapids with the power to grant irrepealable franchises in or over the streets of that city and thereby confer upon the grantees privileges or franchises not subject to alteration, amendment or repeal—rights which the Legislature could not itself have directly conferred. If such a presumption is proper, the conclusion is reached that the agencies or creatures of the State may, in the exercise of derivative and delegated powers, do what the Legislature itself could not do. This would violate the well-settled rule that the Legislature cannot do indirectly, through the local government, what the people have by their

constitution restricted it in doing directly. Dill. Mun. Cor. (2nd Ed.), Sec. 263.

So, in reference to street railways, it is well settled by the authorities that, under general powers, such as the City of Grand Rapids possesses over its streets and highways, its Common Council could not confer upon individuals or a private corporation the exclusive right to use the city's highways for street railway purposes. See Cooley Const. Lim., 207, 208; Davis vs. Mayor of New York, 14 N. Y., 506; Milhau vs. Sharp, 27 N. Y., 611; Railroad Co. vs. Smith, 29 Ohio St., 201; Railroad Co. vs. Railroad Co., 10 Wall., 52; Railroad Co. vs. Railway Co., 12 Fed. Rep., 308; Railroad Co. vs. Railway Co., 24 Fed. Rep., 306; Railway Co. vs. Railway Co., 79 Ala., 465; Dill. Mun. Corp. (2nd Ed.), Sec. 558, and cases cited.

In Railroad Tax Cases, 13 Federal Reporter, 722-789, Mr. Justice Field, sitting as Circuit Justice, said:

"Whatever the State may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer, by its general laws, upon corporations, certain capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure. It may make the grant subject to modifications, and impose conditions upon its use, and reserve the right to change these at will. But, whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guarantees which protect the property of individuals spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances. *The State grants to railroad corporations formed under its laws a franchise, and over it retains control, and may withdraw or modify it. By the reservation clause, it retains power only over that which it grants.*

* * * *The reservations relate only to the contract of incorporation, which, without such reservation, would be irrepealable.* It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the Supreme Court held that charters are not contracts, and that laws repealing or altering them did not impair the obligations of contracts. The property of a corporation acquired in the exercise of its faculties is held independently of such reserved power, and the State can only exercise over it the control which it exercises over the property of individuals engaged in similar business."

And Judge Sawyer said, on page 777:

"The Legislature, under the various guarantees of the constitution, State and National, can only take away, limit, enlarge, or modify that which it gave. And that is given in the creative act is, simply, its capacities; its legal faculties, including all such as are essential to its corporate existence all those powers which are strictly corporate, being those powers which can only be given by legislative act; powers not possessed by natural persons or partnerships, acting in their natural, individual, or associate characters, independent of legislation. These strict corporate powers I attempt to define in Orton's Case, 6 Sawy., 187, 32 Fed., 457."

I submit, therefore, that it ought to be held by this Court:

1. That neither the train railway act nor the street railway act confers upon the Common Council of the City of Detroit the authority to make irrevocable contract in relation to the rates of fare upon street railways.

2. That the Common Council of the City of Detroit has not assumed to make an irrevocable contract in relation to rates of fare; that the language employed in the several ordinances is not of that clear, definite and certain character necessary to deprive the Common Council of the power of continuing regulation, even if it had authority so to do.

3. That the determination of the rates of fare is a function of government delegated by the State to the local authorities and cannot be bargained away.

4. That the fixing and determination of said rates of fare is the exercise of a legislative power delegated to the local authorities, and is at all times subject to alteration, amendment or repeal, pursuant to the provisions of Art. 15, Sec. 1, of the Constitution of the State of Michigan.

I respectfully submit, therefore, that the decree of the Circuit Court of the United States for the Eastern District of Michigan should be reversed, and the ordinance of August 11th, 1899, held valid and enforceable.

Respectfully submitted.

TIMOTHY E. TARSNEY,

Solicitor for Defendants and Appellants.

ARE THE EXTENSION ORDINANCES VALID?

The Detroit City Railway Ordinances of November 24, 1862 was limited to thirty years.

Sec. 20, Rec. p. 30.

"The powers and priviledges conferred by the provisions of this ordinance shall be limited to thirty years from and after the date of its passage."

The same is true of the Grand River Street Railway ordinance adopted May 1, 1868.

Sec. 19, Rec. p. 56.

Likewise the Fort Wayne and Elmwood ordinance adopted January 31, 1865.

See Sec. 20. p. 73, Rec.

November 14, 1879, the Common Council of Detroit adopted an ordinance entitled "An Ordinance supplementary to an ordinance, entitle "An Ordinance permitting certain persons to establish and locate railways in the city of Detroit, approved November 24, 1862, and amendments thereto and for other purposes."

Rec. p. 35.

This ordinance contains, among other things, the following provision: "Sec. 5. The powers and privileges conferred and obligations imposed on the Detroit City Railway

by the ordinance passed November 24, 1862, and the amendments thereto, are hereby extended and limited to 30 years from date."

December 3, 1885, a like ordinance was adopted in relation to the Grand River Street Railway Company. In section 2 is the following language: "The powers and privileges conferred and the obligations imposed on the Grand River Street Railway by the ordinance passed May 8, 1868, and the amendments thereto, are hereby extended and limited to 30 years from and after the first day of January, 1886.

Rec. p. 58.

June 30, 1880, in a supplementary ordinance relative to the Fort Wayne and Elmwood Street Railway Company, section 3, provides: "The powers and privileges conferred and obligations imposed on the Fort Wayne and Elmwood Street Railway Company, by the ordinance passed Jan. 31, 1865, and the amendments thereto are hereby extended and limited to 30 years from this date."

By Act 486, Local Laws 1869, p. 1689, the charter of the city of Detroit was amended and section 19, of chapter 7 was made to read as follows:—

"Sec. 19: The style of all ordinances shall be: 'It is hereby ordained by the people of the city of Detroit'. No ordinance shall be revised, altered or amended by reference to its title only, but the section or sections of the ordinance altered or amended shall be re-enacted and published at length."

This language is substantially the same as that contained in section 25 of article 4 of the Michigan state constitution.

In Mok vs. Detroit B & S Association 30 Mich., 511, the Supreme court held an act which incorporated within itself by mere reference another act, but with several changes

and modifications not made by the re-enactment of the section changed or modified, void under this provision of the state constitution.

"And it has frequently been held that the mischief designed to be remedied by the provision was the enactment of amendatory statutes,—by the insertion of certain words or the substitution of one phrase for another in an act or section referred to but not published,—in terms so blind that legislators themselves were sometimes deceived with regard to their effect and the public from the difficulty in making the necessary examinations and comparisons failed to become appraised of the changes made in laws."

People vs. Mahaney, 13 Mich., 481.
East Saginaw Manufacturing Co vs. E. Saginaw 19 Id. 259.
Mok vs. Detroit and B & S Association 3) Id, 511.
Gordon vs. Peeple, 44 Id. 485.
Attorney General vs. Parcell. 100 Id. 107.

It strikes me that these several amendatory ordinances are void. because they assume to extend or carry forward the entire provisions of the original ordinances years beyond the time to which they were originally limited without re-enactment and without re-publication.

No. 152.

Reply Brf. of Tarsney for Appts.

FILED
OCT 22 1901
JAMES H. MCKENNEY

SUPREME COURT

OF THE UNITED STATES

Filed Oct. 22, 1901.

OCTOBER TERM.

THE CITY OF DETROIT, et al.
Defendants and Appellants.

vs.

THE DETROIT CITIZENS STREET RAILWAY COMPANY

No. 152

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, IN EQUITY.

REPLY BRIEF OF TIMOTHY E. TARSNEY, CORPORATION COUNSEL, FOR DEFENDANTS AND APPELLANTS.

TIMOTHY E. TARSNEY,
Solicitor for Defendants and Appellants.

DETROIT:
THE THOS. SMITH PRESS, 42-44 LARNED ST., W
1901.

SUPREME COURT

OF THE UNITED STATES.

CITY OF DETROIT, ET AL., *Defendants and Appellants,* vs. THE DETROIT CITIZENS' STREET RAILWAY COMPANY, *Complainant and Appellee.*	No. 152.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan, In Equity.

Reply Brief of Timothy E. Tarsney, Corporation Counsel, for defendants and appellants.

I.

It is contended by the learned counsel for the Appellee that the street railway provisions of the Tram Railway Act and the Street Railway Act of 1867 are in pari materia, and must be construed together.

At pp. 25-28 of my original brief the contention was made that the provisions of the Street Railway Act became immaterial in construing the powers of the present company— they

obtained through the purchase of the property or franchises of the Detroit City Railroad Company, Grand River Street Railway Company and the Fort Wayne and Elmwood Railway Company—because all these companies were organized under the Tram Railway Act and all the rights and privileges granted by the city to such company by the several ordinances referred to were with reference to the Tram Railway Act under which such original companies were incorporated.

I think it is quite manifest from a comparison of the two acts that the Legislature of the State of Michigan did not intend to bring within the scope of Section 13 of the street railway act the street railway companies that had previously been organized under the Tram Railway Act.

The contention of counsel for appellee is based upon the provisions of Section 29 of the Street Railway Act, which reads:

"Sec. 29. All companies and corporations heretofore organized in this State for the purpose of building and operating street railways under the statutes then in force, shall have the same powers, rights, protection and privileges, and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

Running through the provisions of the Street Railway Act a distinction is maintained between companies *organized under the provisions of said Act* and the street railway companies organized under the provisions of other laws.

In Sec. 13 it is provided that "*Any street railway* corporation *organized under the provisions of this act*, may, with the consent of the corporate authorities of any city or village, given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations, and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers, in and upon the lines of such streets and

ways, in said city or village, as shall be designated and granted from time to time for that purpose, in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets."

Laws of 1867, p. 46.

By Section 15: "*Any Street Railway Company* may also purchase and acquire" rights and property.

Section 16: "*Every Street Railway Company*" may issue bonds and mortgages.

Section 18: "*Ever Street Railway Company*" is required to lay its track, etc.

By Section *26*: "Each and every railway company *formed under this act*" shall pay the specific tax provided for therein.

Section *27*: "*Every company incorporated under this act*" shall commence construction within one year.

I infer that it was the legislative intent to leave the companies that had been organized for street railway purposes to be controlled by the provisions of Section 34 of the Tram Railway Act, which reads as follows:

"Sec. 34: All companies formed for such purpose shall have the exclusive right to use the same: Provided, however, That no such company shall be authorized to construct a railway under this act, through the streets of any town or city, without the consent of the municipal authorities of said town or city; and under such regulations, and upon such terms and conditions, as the authorities *may from time to time prescribe*."

If such were not the purpose, then why distinguish between companies organized *under the provisions of this and any street railway company?* The same distinction is noted in Section 14, which provides that, "After any city, village or township

shall have consented, as in this act provided, to the construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred."

This distinction is made quite clear when we consider that the Street Railway Act was approved March 5, 1867, and took immediate effect, and that 22 days later an Act was approved amending the Tram Railway Act, in which Section 34 was re-enacted and amended so as to read:

"Sec. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railway constructed, owned or held by them: Provided, That no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe: Provided further, That after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof."

Laws, 1867, p. 256.

The Tram Railway Act was further amended by Act No. 91, of the Laws of 1871, and a new section was added thereto, to stand as Section 42, which reads:

"Sec. 42. All the provisions of this act, as amended, shall be applicable to *all* corporations now organized under this act, as though specifically named."

Laws, 1871, p. 132.

So that the last legislative declaration upon the subject of street railways so far as it appertains to any question involved in this case is contained in the Tram Railway Amendment of March 27, 1867 and the Amendment of 1871, and being the last enactment upon that subject, I assume that it controls.

If the street railways that had been organized under the Tram Railway Act were for any purpose intended to be brought within the provisions of the Street Railway Act, it would be because Section 29 of the Street Railway Act, above quoted, sweeps such companies within its provisions, but Section 29 cannot be sustained as a valid enactment under the constitution of the State of Michigan. Section 20 of Art. 4, Constitution of Michigan, provides that "No law shall embrace more than one object, which shall be expressed in its title." The title of the Street Railway Act is, "AN ACT TO PROVIDE FOR THE FORMATION OF STREET RAILWAYS." The Supreme Court of Michigan have held that the purposes of this provision of the constitution was to arrest corruption and "log-rolling" in legislation and the insertion by dexterous management of clauses in bills of which the titles gave no intimation, and thus securing their passage by legislative bodies whose members were not generally aware of their intention and effect.

People vs. Mahaney, 13 Mich., 481-494.
Kurtz vs. People, 33 Mich., 279.
Thomas vs. Collins, 58 Mich., 64.
Bissel vs. Probate Judge, 58 Mich., 237.
Atty. General vs. Weimar, 59 Mich., 580.
Davis vs. Supervisors, 89 Mich., 295.

The constitution requires that titles shall be truthful indicies of legislation.

Wardle vs. Cummings, 86 Mich., 395-401.

Under our constitution the title of an act is significant and usually controlling in determining its scope. The body of the statute must be reasonably harmonious with it.

McKellar vs. Detroit, 57 Mich., 158.
The Northwestern Mfg. Co. vs. Circuit Judge, 58 Mich., 381.
Booth vs. Eddy, 38 Mich., 245.

Titles may be as general or as specific as the Legislature sees fit to make them, but the body of the act must be confined in its purposes to the object expressed in the title. And when the act is broader than the title, if after striking out all not indicated by the title, what is left is complete, in itself capable of execution and wholly independent of what was rejected, the act may be sustained.

Callahan vs. Chipman, 59 Mich., 610.
Skinner vs. Wilhelm, 63 Mich., 568.
Supervisors vs. Auditor General, 68 Mich., 659.
Ellis vs. Hutchinson, 70 Mich., 154.

The title of the Street Railway Act, "AN ACT TO PROVIDE FOR THE FORMATION OF STREET RAILWAY COMPANIES," under the above rules, is no doubt, sufficient to authorize the organization of street railway companies thereunder and to define the rights, powers, prvileges, duties and liabilities of such companies, but such title is not broad enough to warrant the sweeping in to such act corpora-

tions not formed or organized thereunder, but which are governed and controlled by different provisions of law.

In *Isle Royale, etc., Corporation vs. Osmun*, 76 Mich., 162, it appeared that in an Act "to revise the laws providing for the incorporation of companies for mining, smelting and manufacturing iron, copper, silver, mineral, coal, and other ores or minerals, and to fix the duties and liabilities of such corporations." There was incorporated a section reading: "Foreign corporations, organized for the purposes contemplated by this act, upon filing copies of their charter or articles of incorporation, as provided in section five, may carry on business in this State, and shall enjoy all the rights and privileges, and be subject to all the restrictions and liabilities, of corporations existing under this act."

The Secretary of State refused to file Articles of Association of an English Corporation. An application was made for mandamus to compel the Secretary to file such articles. Mr. Justice Campbell, in the majority opinion, quoting Article 4, Section 20, of the Constitution, which declares that "No law shall embrace more than one object, which shall be expressed in its title," said:

"This section has been applied by our decisions to multifariousness in the creation or amendment of general corporation laws. Citing *Skinner vs. Wilhelm*, 63 Mich., 568; *People vs. Father Matthew Soc.*, 41 Mich., 67. And in *Mok vs. Det., etc., Association*, 30 Mich., 511, a statute which authorized bodies for one purpose to be incorporated, with some modifications, by reference to a previous statute on a similar subject, tha titself provided that corporations for building and leasing might be organized under the provisions of the statute—which in its revised form is now before us—concerning companies for mining and manufacturing metals and mineral products, was held void for similar reasons." And he said further: "If

Section 23 is intended to confer powers on foreign corporations as such, it is not within the title or general purpose of the statute or of the constitutional provision."

No one looking at the title of the Street Railway Act and seeing that it provided for the "formation" of street railway companies would dream for a moment that hidden somewhere within its provisions was a design to confer rights and powers upon street railways not formed under its provisions. Again, Section 29 is obnoxious to the provisions of Section 25 of Article 4 of the Constitution of Michigan, which declares that, "No law shall be revised, altered or amended by reference to its title only, but the act revised and the section or sections of the act altered or amended shall be re-enacted and re-published at length." This section of the constitution was under consideration in *Mok vs. Detroit Building and Savings Association*, 30 Mich., 511. Wherein an Act "To authorize the formation of corporations for building and leasing houses and other tenements" provided that corporations indicated in the title might be formed under the provisions of an Act "to authorize the formation of corporations for mining, smelting or manufacturing iron * * * or other ores or minerals, and for other manufacturing purposes," and should have and possess all the rights, and be subject to all the liabilities provided in said act and the acts amendatory therof. Another act was passed which provided that, "corporations for building and savings associations may be formed and incorporated under the provisions" of the act of 1855, the substance of which has already been given.

Mr. Justice Cooley in a very elaborate opinion held this legislation void under the constitutional provision above quoted, in which he said: "Alteration made in the statutes by mere reference, and amendments by the striking out or insertion of words, without reproducing this statute in its amended form,

were well calculated to deceive and mislead, not only the Legislature as to the effect of the law proposed, but also the people as to the law they were to obey, and were perhaps sometimes presented in this obscure form from a doubt on the part of those desiring or proposing them of their being accepted if the exact change to be made were clearly understood. Harmony and consistency in the statute law, and such a clear and consecutive expression of the legislative will on any given subject as was desirable, it had been found impracticable to secure without some provision of this nature; * * *"

At the close of his opinion on page 529, he said: "What has been attempted here is, to duplicate an act, but at the same time t oaccommodate it by indirect amendments to a new class of cases, in disregard of the constitutional provision which requires *each act of legislation to be complete in itself*, and forbids the enactment of fragments which are incapable of having effect or of being understood until fitted into other acts after by construction or otherwise places have been made for them. No such legislation can be sustained."

Speaking of this decision in *Burton vs. Schildbach*, 45 Mich., 504, at page 508, Judge Cooley said:

"The defect in the act was found to be that it was not complete and sufficient in itself to permit of incorporations under it, and that it undertook to accomplish the purpose by reference to an indirect and blind amendment of a previous statute, whereas the Constitution requires that all amendments of statutes shall present the provisions in full as amended."

How can the contention of the learned counsel for the complainant and appellee, in this case, that the Street Railway Act controls the provisions of the Tram Railway Act, thus operating as an indirect amendment thereof, without violating the constitutional provision which forbids any amendment without re-enactment of the section amended.

I therefore respectfully submit that in the consideration of this case the relative rights of the city and the Street Railway Company must be governed and controlled solely by the provisions of the Tram Railway Act, and that this act contains a continuing power of regulation.

In what I have said I do not desire to be *understood as conceding* any other or different construction should be placed upon the street railway act if it should be held to be applicable here, for no power can be found in the Street Railway Act authorizing the city authorities to enter into a time contract, irrevocable in its nature, with the street railway companies.

II.

In he brief of Messrs. Brennan & Donnelly, at pages 33-35, Section 19 of the Detroit Street Railway Ordinances is discussed

Section 19. It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways."

And it is contended by the learned counsel that, "The plain, common sense meaning of it is, that the Council thought there might be some matters not treated of or regulated in the original grant, and that it would be wise to in express terms reserve the power to make such additional rules as might be necessary, in the opinion of the Council, to protect the interests of the public.

It is respectfully submitted that this reservation is not confined to such further additional rules, but should be construed with reference to the exigencies that might from tim eto time arise and changed conditions demand. The construction contended for by counsel would tie the hands of the city authori-

ties from making rules and regulations for the safety, comfort and welfare of the inhabitants. If no consent of the railway company could be obtained, we might still be operating cars through our streets according to the primitive methods of 1862. To illustrate: Section 7 of the Detroit Railway ordinance provided that, "Section 7. The cars to be used on said railways shall be drawn by animals only, at a speed not exceeding the rate of six miles per hour, and shall be run as often as public convenience shall require and the Common Council shall prescribe. Provided, always, that said Common Council will not require them to run regular cars oftened than once in twenty minutes during fourteen hours every day, from the fifteenth day of April to the fifteenth day of October, and twelve hours every day, from the fifteenth day of October to the fifteenth day of April."

Detroit, in 1862, was a city of about 50,000 people. Its residents all lived within a comparatively short distance of the business center and street railways was in an experimental stage. The only motive power known was animals. The rails were strap rails. Suppose no changes had been made in this section, to-day, with a population six times greater than that of 1862, when the interests require that cars shall run not to exceed two or three minutes apart, with electricity as motive power and the speed fifteen to twenty miles an hour, and rails weighing ninety pounds per yard, the public necessities demanding this improved method of transit, could it be successfully contended that the city was powerless to require the railroad company to keep pace with the progress of the age and that it must content itself with bob-tailed horse-cars to run not to exceed six miles per hour nor oftener than once in twenty minutes, a mere statement of the proposition, it strikes me, conveys the answer. Or as put by the Michigan Court in *People vs. Detroit Citizens' Street Railway Company*, 116

Mich., 132: "On the other hand, is it probable that the railway company would be willing to accept an ordinance running for 30 years which limited it to the use of animal power in the transportation of its cars, and to a speed of six miles an hour? We think this contention is unreasonable." Such has not been the construction placed upon these ordinances by the Michigan Supreme Court.

In *Detroit vs. Fort Wayne and Elmwood Railway Co.*, 90 Mich., 646, the railway company in the summer of 1890, in pursuance and under the authority of the ordinance, constructed a portion of its railway on Champlain street, under the supervision and in the manner approved by the Board of Public Works, and in every respect in full compliance with the terms and conditions and agreements of the ordinance under which it was operated. The method of construction adopted was the laying of ties which extended outside the rails. In 1891 the Common Council adopted a resolution directing the railway company to be caused to be removed so much of the railway ties as are outside of the stringers on whic htheir rails were placed in order that the street might be paved with a concrete foundation. The company refused to comply with this demand and mandamus was applied for and granted. The Court said: "The charter of the City of Detroit commits the regulation, supervision, and control of its streets to the Common Council. It empowers the Council to improve the same and to determine the nature and details of such improvement. It gives the Common Council the power to control, prescribe, and regulate the manner in which the streets shall be used and enjoyed. These powers are held in trust for the public benefit. They cannot be surrendered or delegated to private parties. All franchises granted or contracts made, with reference to the use of streets must be made, not only with due regard to their lawful and proper use by

others, but subject to the exercise by the municipality of the powers referred to."

The ordinance under consideration there contained the same reservation as is contained in Section 19 of the Detroit City Railway ordinance.

Again, in *Detroit vs. Fort Wayne & Belle Isle Railway Co.*, 95 Mich., 456, quoted by brother Baker in his brief, page 13, learned judge, after quoting the reservation, said: "In the absence of the reservation in the ordinance it could not be said that the rights and franchises of the respondent are destroyed or unreasonably impaired by the requirement sought to be enforced; but, independently of this statutory provision, the reservation contained in the ordinance itself, viz., 'to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public,' certainly includes the right to enact an ordinance that the compnay shall, for the accommodation of the public, keep tickets for sale upon its cars."

In *City of Kalamazoo vs. Michigan Traction Company*, decided May 7, 1901, 8th Detroit Legal News, p. 82, 85 N. W., p. 1067. Was mandamus to compel the traction company, a street railway company, to comply with certain requirements of the Common Council. In Section 5 in the ordinance it was provided that all track * * * may be of the style known as T rail or girder rail, *at the option of said grantee.* * * * The same shall not weigh less than forty pounds to the yard if T, and not less than fifty-two pounds to the yard if girder rail. Section 23 of said ordinance as originally passed is as follows: "Section 23. The said City Council hereby reserves the right to make such further rules, orders and requirements as may from time to time be deemed necessary to protect the interests, safety, welfare, and accommodation of the public in relation to said railway, not inconsistent with the porvisions

of this ordinance, but they shall not reduce the rate of fare herein provided for, or alter or repeal section one of this act." The Common Council subsequently amended Section 5, changing the option of the kind of rails from the grantee to the grantor. The Common Council passed a resolution directing the company to take up the rail now in use and replace the same with an eight-inch grooved girder rail. The railway company refused to comply with this requirement.

The Court in passing upon the question, while conceding that contractual rights in streets and highways might be obtained, ye, "The authorities do not, however, go so far as to hold that the grant of a right to use a certain kind of rail is irrevocable. On the contrary, the conclusion seems to be that, when the use of another kind of rail becomes necessary for the protection and safety of the public, the right to use the specified article must give way to the necessities and requirements of the public."

Again referreing to the reserved power contained in Section 23: "This ordinance, fairly construed, cannot be held to mean that the respondent, in the construction of its roadbed in accordance with the provisions of the ordinance, obtained the right, during the existence of its franchise, to maintain its roadbed and rails in the same condition as when laid. The ordinance contemplated improvements which experience might show to be essential, in the growth of the city, for the convenience, welfare, and safety of travelers upon its streets, and the right to compel such improvements was reserved."

I think, fairly construed, these reserevations were intended to meet any changes in conditions and to make rules, orders and regulations for the benefit of the public, even though such rules, orders and regulations cover matter that was originally specified.

III.

In the brief of Messrs. Brennan and Donnelly, pages 28-33, it is contended that rates of transportation, though within the police power of the State, is nevertheless the subjec matter of contract. I have fully discussed this proposition in my original brief (pages 72-86), but the subject is of such grave importance that I may be pardoned for briefly referring to it again.

The current of Michigan and Federal authority favor my contention that the police power cannot be delegated or bargained away nor can a municipal corporation by any contract hamper itself in the exercise of it.

Judge Cooley, in *Gale vs. Kalamazoo*, 23 Mich., 344, said: "What would be thought proper for the village this year, might be found worse than useless the next, and no official prescience could determine with absolute certainty what changes a few years might work. Indeed it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. These powers are enforced in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government with restrictions for the protection of individuals or municipal rights could long exist without recognition."

In *Pontiac vs. Carter*, 32 Mich., 164, the same learned justice said: "A city cannot even by contract divest itself of any of its legislative powers, which was conferred upon it to be exer-

cised again and again as long and as often as occasion shall require."

In *Petz vs. City of Detroit*, 95 Mich., 169, it is said: "The police power cannot be abridged, granted or bargained away, or impaired by contract."

And Mr. Justice McGrath, in 95 Mich., 456, quoted by Mr. Baker on page 13 of his brief, said: "It cannot be contended that the relation created by the ordinance is contractual, and at the same time that the reservation was of the right to enact police regulations only. The right to exercise police power exists indepnedent of the reservation, and could not be bartered away."

The Supreme Court of the United States, in *Stone vs. Farmers' Loan and Trust Company*, 116 U. S., 307, in speaking of the power of regulation of transportation rates, seemed to doubt the power to enter into binding contracts in relation thereto, and said: "This power of regulation is a power of government, continuing in its nature; and *if it can be bargained away at all*, it can only be by words of positive grant or something which is in law equivalent."

In *New York & New England Railroad Co. vs. Bristol*, 151 U. S., 556, the Court said: "The governmental power of self-protection cannot be contracted away."

In *Wabash Railroad vs. Defiance*, 167 U. S., 88, it was said: "Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the Common Council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants."

So in *C., B. & Q. R. R. Co. vs. Nebraska*, 170 U. S., 57, which contains a very clear exposition of the law upon this subject:

"Usually, where a contract, not contrary to public policy has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons and corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which effects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature."

Michigan Telephone Compan vs. City of Charlotte, 93 Federal, 11, the city had given its consent to the construction of a telephone line through Main street. Subsequently by ordinance the city directed the poles to be removed from Main street to an alley next adjoining said street. It was urged that the ordinance amounted to the impairment of the obligation of a contract.

Judge Severns in passing upon this contention said: "But here again assuming that the contract exists, it is well settled that with respect to contracts of this character they are subject to such incidental modification as results from legislation required in the public interest. It is a fundamental proposi-

tion that the Legislature cannot deprive itself by contract of the power to pass such laws as are necessary for the general welfare of the public. Prominent among the kinds of legislation which may be enacted for the purpose are such as are designed for the public safety and convenience." Citing in support of his position, *N. Y. & N. E. R. R. Co. vs. Bristol*, 151 U. S., 556; *Wabash R. R. Co. vs. City of Defiance*, 167 U. S., 88; *C., B. & Q. R. R. Co. vs. Nebraska*, 170 U. S., 57.

It seems clear from the recent trend of authorities that it is quite proper to speak of the relations existing between the street railway company and the city as contractual; but that such contract is always made with reference and subject to the laws as they exist or such laws or regulations as may from time to time be enacted in the public interest. That the parties so contemplated when they entered into such engagement and that it is not an impairment of the obligation of a contract to impose new terms or enact new regulations which the public interest, safety or welfare may require.

IV.

General Duffield, in the 8th paragraph of his brief at page 35, refers to my 5th contention, page 86, of my orginal brief: "The regulation of fares in the ordinances in question may be supported by the reserve power of alteration, amendment or repeal contained in the constitution and statutes of Michigan." Which declares that "corporations may be formed under general laws but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed." And he disposes of it by wafting it away as "fog before a gale" and relies upon the decision of this Court in *City Railway Company vs. Citizens' Street Railway Company*, 166 U. S., 557-563. But a moment's reflection will show that the cases are clearly distin-

guishable. There is no provision in the Constitution of the State of Indiana that all laws relative to corporations are subject to alteration, amendment or repeal. In that case the right was reserved to the General Assembly in the legislative act to amend or rpeal at their discretion, and this Court very properly held that that was a right reserved to the General Assembly itself and was not delegated to the Common Council of the city. I content myself with a reference to the language of Mr. Justice Jackson, quoted on page 108 of my original brief, where he was discussing the validity of an ordinance of the City of Grand Rapids, and referred to the constitutional provision above quoted and said: "Is it to be presumed that the Legislature, under its constitutional authority 'to confer upon incorporated cities such powers of a local, legislative and administrative character as they may deem proper,' intended to invest the Common Council of Grand Rapids with the power to grant irrepealable franchises in or over the streets of that city and thereby confer upon the grantees privileges or franchises not subject to alteration, amendment or repeal—rights which the Legislature itself could not itself have directly conferred. If such a presumption is proper, the conclusion is reached that the agencies or creatures of the State may, in the exercise of derivative and delegated powers, do what the Legislature itself could not do. This would violate the well settled rule that the Legislature cannot do indirectly, through the local government, what the people have by their constitution restricted it in doing directly."

V.

The word "consent" as used in this statute received a construction by the Supreme Court of Appeals of the Sixth Circuit, in *Detroit Citizens' Street Railway Company vs. Detroit*, 64 Fed., 628, where Judge Lurton said: "Our conclusion

upon this branch of the case is: First, that the Legislature meant by the term 'consent' no more and no less than would be meant by 'right of way' or 'easement.' 'Consent' in the connection used is synonymous with easement or right of way." And the Michigan Supreme Court in *Street Railway Company vs. Detroit*, 110 Mich., 384, said: "There is a limitation upon the right of the company to construct a railway, which is that, before doing so, the company shall procure the consent of the municipal authorities under such regulations and upon such terms and conditions as said authorities may from time to time prescribe. Fairly construed, this language relates to the terms and conditions to be prescribed for the contemplated occupancy of streets the use of which is presently contemplated by the parties to the contract, and the 'terms and conditions' relate to such occupancy of the streets."

I respectfully submit that there is a marked distinction between the easement or right of way in the street that is "consented to" by the Common Council and the regulations and conditions under which the railway may be from time to time operated; the easement or right of way conveys, no doubt, a property right; the city having the general control of streets, such consent must come from the city. The State, however, has control of the formation and existence of corporations, and likewise the State has control and the power of regulation of rates of transportation. The State has delegated to the city the power of regulation and the fixing of terms and conditions from time to time, and in doing so, the city acts not for itself, but for the State under its delegated power.

It is possible that this Court may treat the validity of the extension ordinances of November 14, 1879, June 30, 1880 and December 3, 1885, as *res judicata*, under the decision in the 64 Federal, but the sole question involved or discussed in that case was the power to grant a franchise for a period

extending beyond the lifetime of the corporation to which it was granted. Such extension ordinances are certainly an alteration of the original ordinances without re-enacting them. In one short paragraph it was declared that "the powers and privileges conferred and obligations imposed on the Detroit City Railway by the ordinance passed November 24, 1862, and the amendments thereto are hereby extended and limited to thirty years from date." Those ordinances would have expired by limitation in 1892, 1895 and 1898. The two last had not expired at the time such litigation was begun. The provision of the Detroit charter as amended by Local Acts 1869, page 1689, reads: "The style of ordinance shall be: 'It is hereby ordained by the Common Council of the City of Detroit.' No ordinance shall be revised, altered or amended by reference to its title only, but the section or sections of the ordinance altered or amended shall be re-enacted and published at length."

If this should be regarded as still an open question, then I respectfully submit that these extension ordinances were passed in violation of the above quoted charter provisions, and hence void for the reasons stated by me in the last pages of my original brief. This Court in *Cromwell vs. Sac County*, 94 U. S., 351, at page 353, held that "where a second action between same parties is upon a different demand, that a prior judgment operates as an estoppel only as to matters in issue or points controverted upon which such demand was based." Mr. Justice Field said: "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

And Judge Taft, in *City of Detroit vs. Detroit Railway*, 56 Fed., 893, in passing upon the validity of the Detroit Railway extension, held that the city was not concluded by a judgment sustaining that part of the ordinance fixing tax rate for the extended period. If the doctrine of estoppel is to be applied at all it can only extend to the Detroit City Railway ordinance and cannot affect the Fort Wayne & Elmwood or the Grand River ordinance, because it was only the Detroit City Railway ordinance that was litigated in the former controversy, hence, the rule followed by this Court in *Chance Mining Co. vs. Tyler Mining Co.*, 157 U. S., 687, holding decree as to priority of location on part of mining claim not conclusive as to the rest. Mr. Justice Brewer said: "The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided."

To the contention that the city should be held estopped because the railway company in apparent reliance upon the validity of these extension ordinances has expended large sums of money, I readily grant that at first blush such claim appeals strongly to the conscience, and if we were dealing with an arrangement between private parties, each acting in relation to their own interests, or if the investment had been made for the benefit of the city, I would readily concede the force of the contention, but we are dealing here with a question of power.

As was said by Judge Taft in *City of Detroit vs. Detroit City Railway*, 58 Fed., 893: "The investments of the street railway company were not given to the city. They were investments of private funds in private property, for private

purposes, to subserve the public interest, on the faith of the supposed permanence of the investment. Those who made the investment knew, or ought to have known, the statutory powers under which the City Council acted, and if I am right in the conclusion already stated with reference to those powers, ought, in the necessary theory of the law, to have known that they were investing on the faith of a grant which would last only to May 9, 1893. Where full knowledge of the powers of a corporation are had by the person dealing with it, he cannot plead estoppel by reason of a mistake of law, to avoid the claim of *ultra vires*. This is especially true in cases where the corporation is a municipal corporation and is exercising powers in trust for the public. *Rens vs. City of Grand Rapids*, 73 Mich., 237; *Bogart vs. Lamotte Twp.*, 79 Mich., 294; *Spitzer vs. Village of Blanchard*, 82 Mich., 234."

And this Court in *Hamilton Gas, Light & Coke Co. vs. City of Hamilton*, 146 U. S., 258, in answer to the same contention there made, said: "It may be that the stockholders of the plaintiff supposed at the time it became incorporated and when they made their original investment that the city would never do what evidently is contemplated by the ordinance of 1889. * * * It is one of the contingencies to which parties look now in making a large class of contracts that they may be affected in many ways by state and national legislation."

I respectfully submit that it should be decreed that the City of Detroit possesses the power to pass the amendatory ordinances.

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